Supreme Court, U.S.
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No. 09-359

In The

Supreme Court of the United States

NANO MALDONADO, AN INDIVIDUAL,

Petitioner,

v.

RANDELL IWASAKI, IN HIS CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As amended in 2008, the California Outdoor Advertising Act prohibits offsite commercial advertising, but exempts onsite commercial advertising, as well as "noncommercial, protected speech contained within any advertising display." Petitioner Maldonado owns a billboard that was erected with a valid building permit in 1956, and the billboard is located on private property in a regulated zone. Is the legal distinction between commercial and noncommercial speech so vague, overbroad, and arbitrary that it violates Due Process and abridges the Freedom of Speech and Press?

2. A precedent of this Court held that a zoning law which banned newsracks displaying commercial publications, but exempted newsracks displaying noncommercial publications, was overbroad as a commercial speech regulation under prong four of the *Central Hudson* test, and could not otherwise qualify as a "time, place, and manner" regulation (subject to a different intermediate scrutiny test) because the commercial-noncommercial distinction was content-based. Is that precedent binding as to billboards? What legal standards should be used to evaluate injunctions and equal protection claims involving a commercial-noncommercial distinction?

QUESTIONS PRESENTED – Continued

3. Under prong three of the *Central Hudson* balancing test, the government generally must submit substantial evidence to prove that its censorship of truthful, non-misleading commercial speech "materially advances" a substantial government interest. In the context of billboards, does an offsite commercial speech restriction materially advance aesthetic and traffic safety interests as a matter of law, or must the government submit substantial evidence to prove the law is effective, both in the aggregate and as-applied to the particular billboard?

PARTIES

Petitioner is Nano Maldonado, an individual.

Respondent is the Director of the California Department of Transportation, Randell Iwasaki, sued in his official capacity. Mr. Iwasaki succeeded former Director, Will Kempton on August 1, 2009 and has been named in the caption pursuant to Rule 35(3).

It should also be noted that Jeff Morales, the Director at the time the case was originally filed back in 2002, was succeeded by Tony Harris, Mr. Kempton's predecessor, as noted in the Ninth Circuit's 2004 Opinion (App. 99), but nevertheless was errantly named as a party in the caption of the Ninth Circuit's 2009 Opinion (App. 1).

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ORDERS AND OPINIONS

The various orders and opinions of the United States District Court for the Northern District of California (per Breyer, J.); two panels of the United States Court of Appeals for the Ninth Circuit (per B. Fletcher, Reinhardt, and Restani; and McKeown, Callahan, and Siler, J.J.); and the United States Supreme Court are re-printed as follows:

Ninth Circuit *Opinion* Dismissing in Part and Affirming in Part (2/25/09); App. 1-22 (officially reported as *Maldonado v. Morales*, 556 F.3d 1037 (CA9 2009));

District Court *Judgment* (3/1/07); App. 23-24;

District Court *Memorandum and Order* re 2nd Motion for Summary Judgment – Equal Protection (1/10/07); App. 25-36 (unofficially reported as 2007 WL 108414);

District Court *Memorandum and Order* re 2nd Motion for Summary Judgment (7/13/06); App. 37-60 (unofficially reported as 2006 WL 1980393);

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(officially reported as *Maldonado v. Kempton*, 422 F.Supp.2d 1169 (N.D. Cal. 2006));

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Ninth Circuit *Order* re Consolidation (5/17/07); App. 138-139;

Ninth Circuit *Order* Denying Re-hearing (6/24/09); App. 140-141.

JURISDICTION

The Ninth Circuit rendered its decision on February 25, 2009, and denied re-hearing on June 24, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

LEGAL PROVISIONS

The legal provisions involved are the California Outdoor Advertising Act and the First and Fourteenth Amendments to the U.S. Constitution. App. 142-147.

STATEMENT OF THE CASE

The most famous billboard in Silicon Valley (at least among lawyers and judges) belongs to petitioner Nano Maldonado. It stands above a warehouse, behind a sound wall, adjacent to an eight-lane stretch of Interstate Highway 101 in Redwood City, California.

The billboard was erected in 1956 pursuant to a valid municipal building permit. At the time it was built, the California Outdoor Advertising Act ("Act") did not apply within the jurisdiction of cities. Former Calif. Bus. and Prof. Code § 5226; Stats. 1939, ch. 32,

p. 334 (stating that Act applied "in any territory of the State of California, *other than the territory within incorporated cities and towns*") (emphasis added).

In 1967, the Act was substantially revised. The municipal exclusion was dropped, and all billboards within "landscaped" zones were generally banned. § 5440; App. 143. Non-conforming billboards were given a three-year grace period before they became subject to removal. § 5441; App. 144. Billboards displaying onsite messages (*i.e.*, those which "advertise goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed") were exempted from the ban. § 5442(c); App. 143.

Maldonado acquired the warehouse and billboard in the early 1990's and offered to lease both to all comers. Sometime thereafter, the California Department of Transportation ("Caltrans") initiated enforcement proceedings against Maldonado for displaying offsite messages under the Act's nuisance *per se* provision. § 5461; App. 144. Maldonado argued that the messages should be deemed onsite because he had granted the advertisers leasehold interests in the warehouse. The trial court disagreed and issued a permanent injunction against further offsite advertising, and the ruling was mostly affirmed on appeal in a published decision. *People ex rel. Dept. of Transp. v. Maldonado*, 86 Cal.App.4th 1225 (2001) ("*Maldonado I*").

Caltrans subsequently obtained contempt convictions against Maldonado for publishing offsite messages in violation of the injunction, but Maldonado was also held in contempt for publishing messages such as, "Available for Onsite Use," which the Act seemed to exempt. § 5442(a) (exempting advertisements for "the sale or lease of the property upon which the advertising display is placed").

Maldonado retained new legal counsel and in 2002 filed this federal action for injunctive relief against the Director of Caltrans, claiming the Act, and the state court injunction based thereon, were unconstitutional. The District Court dismissed challenges to the Act's permitting scheme for lack of standing. App. 127-128 citing *Maldonado I* at 1233 ("So long as the portion of Highway 101 alongside appellant's property is designated 'landscaped freeway,' permits are irrelevant to any advertising thereon."). The other claims were dismissed under the doctrines of *res judicata* and *Rooker-Feldman* on the ground that they should have been brought in the previous state court proceeding. App. 128-135.

Immediately following the dismissal, Caltrans hauled Maldonado back into state court and prosecuted him for contempt for publishing the messages, "In God We Trust" "We Pray for World Peace" and "Help Stop Terrorism." Caltrans won a contempt conviction against Maldonado for publishing the Habitat for Humanity message, "With your help we're Building Community on the Peninsula."

Meanwhile, Maldonado appealed the federal dismissal based on *res judicata* and *Rooker-Feldman* grounds, and eventually won a reversal. App. 99-121; *Maldonado v. Harris*, 370 F.3d 945 (CA9 2004) ("*Maldonado II*"), *cert. denied, sub nom., Kempton v. Maldonado,* 544 U.S. 968 (2005).

On remand, the District Court granted Maldonado's summary judgment motion and declared the Act unconstitutional on its face because the offsite prohibition favored onsite commercial speech over noncommercial speech. App. 66-83; *Maldonado v. Kempton*, 422 F.Supp.2d 1169, 1170-1176 (N.D. Cal. 2006) ("*Maldonado III*"). However, as a remedy the District Court purported to judicially reform the state law. App. 83-87; *id.* at 1176-1179. The state court injunction was left intact (the District Court merely ordered a copy of its decision to be attached to any subsequent order to show cause re contempt), and the federal judge also ordered the Director of Caltrans to seek regulatory and statutory amendment. App. 61-63.

Maldonado immediately filed an interlocutory appeal (case no. 06-15657), arguing that a federal judge has no authority to re-write a state law (or order that it be re-written), the federal injunction was too vague to be enforced under F.R.C.P. 65(d), and that the Act was not otherwise severable under California law.

Meanwhile, the District Court ordered that Maldonado's remaining summary judgment arguments be

re-written in light of the judicial reformation. App. 64-65. The District Court eventually granted summary judgment to the Director of Caltrans on all of the remaining claims. App. 37-60 (prior restraint, vagueness and suppression doctrine); App. 25-36 (equal protection).

Maldonado filed an appeal from the final judgment (case no. 07-15535) and the appeals were consolidated. App. 138-139. But after briefing, a new statutory amendment (similar to the District Court's judicial reformation) took effect. § 5275 ("Notwithstanding any other provision of this chapter, the director may not regulate noncommercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter.").

The Ninth Circuit dismissed the interlocutory appeal of the remedial issues as moot in light of the statutory amendment, and otherwise affirmed the District Court judgment on the merits. App. 1-22; *Maldonado v. Morales*, 556 F.3d 1037 ("*Maldonado IV*"). Review *en banc* was denied. App. 140-141.

The basis for federal jurisdiction in the District Court was 28 U.S.C. § 1343(a)(3).

ARGUMENT

The text of the First Amendment does not distinguish between commercial and noncommercial speech. But ever since the New Deal, this Court (and

others) have unsuccessfully tried to articulate a standard that would allow government to regulate the former, without abridging the latter.

Now before the Court is an American citizen who has been told by the Ninth Circuit that he can be summarily punished in a contempt proceeding, or even convicted of a crime, for placing truthful, non-misleading advertisements about lawful products and services on his own legally built billboard structure which is located on private property. Worse yet, the government admittedly does not enforce the ban against others in the same zone.

Petitioner contends that the commercial-non-commercial distinction is arbitrary and that so long as the billboard *structure* is legal it makes no difference whether the message being published is commercial or noncommercial.

I. THIS COURT SHOULD REVIEW WHETHER THE COMMERCIAL-NONCOMMERCIAL DISTINCTION VIOLATES DUE PROCESS

The commercial-noncommercial distinction was created by a 2008 amendment which exempts "non-commercial, protected speech" from regulation. § 5275. The Ninth Circuit ruled the distinction is constitutionally valid (*i.e.*, not vague or overbroad under the First Amendment and Due Process Clause of the Fourteenth Amendment), even for purposes of criminal punishment. *Maldonado IV*, 556 F.3d 1037, 1045-1046.

A. The Legal Standard Used for Making the Commercial-Noncommercial Distinction Should Be Settled

Review is warranted because the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Rule 10(c).

As the California Supreme Court has recognized, this Court "has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment. . . ." *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 960 (2002), *cert. dism.*, 539 U.S. 654 (2003).

As demonstrated below, not only is the commercial-noncommercial distinction unsettled, it is also doctrinally convoluted, distressingly bewildering to practitioners and judges, and hopelessly confusing to lay people.

1. The "Common Sense" Approach

The "Common Sense" Approach to making the commercial-noncommercial distinction was developed in the 1970's, beginning with this Court's pronouncement that "commercial speech" content "does *no more* than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973) (emphasis added) (upholding injunction prohibiting abetting of "illegal commercial activity" – proposals to hire employees

based upon gender – communicated *via* newspaper want-ads).

Thereafter, that test was used to reject the argument that proposals to arrange *legal* abortion services communicated *via* newspaper ads constituted unprotected commercial speech. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) ("The advertisement published in appellant's newspaper did more than simply propose a commercial transaction.").

Next, this Court struck down a law which regulated all proposals by pharmacists to sell "the X prescription drug at the Y price." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). The commercial-noncommercial distinction appeared to become a distinction without a difference when this Court expressly rejected the argument that "speech which does no more than propose a commercial transaction" lacks all First Amendment protection. *Id.*, 425 U.S. 748, 762; see also, *id.* at 770 (acknowledging that "commercial speech, like other varieties, is protected"); and *id.* at 771-773 (clarifying that commercial speech is subject to same limitations as other forms of protected speech).

Thereafter, this Court struck down a prohibition on proposals to sell residential real estate communicated *via* yard signs. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 86 (1977). Although the "for sale" signs were clearly commercial, this Court applied strict scrutiny – but was careful to

say that the commercial-noncommercial distinction may still be relevant to false and misleading commercial speech. *Id.* at 98 (suggesting "different degree of protection" might be necessary, but leaving the question "for another day").

Strict scrutiny was also applied to commercial advertising regulations in the next two cases, but this Court again emphasized the speech was not false or misleading. *Carey v. Population Services International*, 431 U.S. 678, 701 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-375 (1977).

The "common sense" difference between false and misleading commercial speech, versus "other varieties of speech," finally came into play the next year. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978) ("We have not discarded the 'common sense' distinction. . . .").

In *Ohralik*, this Court *upheld* an anti-solicitation rule as applied to an attorney in private practice. But in a companion case, this Court held that solicitations by ACLU attorneys could not be punished because such activity was deemed "political." *In re Primus*, 436 U.S. 412, 422 (1978). The stated difference was the "pecuniary motivation" of the private attorney which created "special problems of conflict of interest." *Ohralik* at 461, n. 19; and *id.* at 469 (Marshall, J., concurring in part and concurring in judgments of both *Ohralik* and *Primus*) (agreeing that Ohralik engaged in "classic examples of 'ambulance chasing,' fraught with obvious potential for

misrepresentation and overreaching"). In *Ohralik*, no proof of actual harm was required. *Id.* at 462-468.

The next case also differentiated between false and misleading commercial speech and other varieties of speech when it *upheld* a law prohibiting optometrists from proposing to provide optometry services communicated *via* a trade name. *Friedman v. Rogers*, 440 U.S. 1, 5 and n. 6 (1979). First, this Court held that the purpose of a trade name "is strictly business" and therefore it "is a form of commercial speech, and nothing more." *Id.* at 11; see also, n. 9 and 10 (discussing the *Pittsburgh Press* test and contrasting cases wherein speech did *more than* propose a commercial transaction). Then this Court held that "there is a significant possibility that trade names will be used to mislead the public." *Id.* at 13.

The four rules to be derived from the "Common Sense" Approach are as follows:

Rule 1: Restrictions upon speech which does *more than* propose a lawful commercial transaction should generally be analyzed under strict scrutiny. *E.g., Bigelow* and *Primus*.

Rule 2: Restrictions upon truthful, non-misleading speech which does *no more than* propose a lawful commercial transaction should also be analyzed under strict scrutiny. *E.g., Virginia Pharmacy, Linmark, Carey*, and *Bates*.

Rule 3: But restrictions upon speech which does *no more than* propose a lawful commercial transaction should be analyzed under rational basis scrutiny "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse. . . ." *In re R.M.J.*, 455 U.S. 191, 202-203 (1982) citing *Ohralik* and *Friedman*.

Rule 4: Restrictions upon speech proposing an illegal commercial transaction should also be analyzed under rational basis scrutiny, and the prior restraint doctrine is inapplicable. *E.g., Pittsburgh Press*.

2. The "Economic Interests" Approach

In 1980, this Court struck down a law that prohibited certain organizations (those which did not spend at least 75% of proceeds on charitable purposes) from making proposals to collect charitable contributions communicated *via* in-person solicitations on public sidewalks and door-to-door. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 624 (1980).

Significantly, this Court explicitly recognized that *Virginia Pharmacy* had overruled *Valentine v. Chrestensen*, 316 U.S. 52 (1943) and several other Supreme Court cases which had generally indicated that commercial speech was excluded from First

Amendment protection. *Id.* at 632, n. 7 ("those decisions, to that extent, are no longer good law").

But just as significantly, this Court altered the "Common Sense" Approach for commercial speech by replacing the "propose a commercial transaction" language with much broader language. *Id.* at 632 ("because charitable solicitation does more than *inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services*, it has not been dealt with in our cases as a variety of purely commercial speech") (emphasis added).

This new definition was later refined as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980).

Central Hudson also dramatically changed the level of scrutiny – lower scrutiny was used to analyze a speech regulation, even though there was no allegation that the speech proposed an illegal transaction, or that its content or manner of communication created a significant possibility of false or misleading statements. *Central Hudson* at 566-571 (striking down law prohibiting utilities from advertising electricity).

This Court decreed that the Constitution generally "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression" and henceforth commercial speech was

generally to be judged under intermediate scrutiny – the four-pronged paradigm that has come to be known as "the *Central Hudson* test." *Id.* at 563-566. A companion case compared commercial speech with libel and obscenity. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530, 538-539 and n. 5.

In 1982 this Court struck down an anti-soliciting rule as applied to an attorney who had proposed to sell his services *via* direct mail, newspaper ads, and phone book "yellow page" ads. *R.M.J.*, 455 U.S. 191, 197-198. The speech was classified as commercial under the "economic interests" test. *Id.* at 204, n. 17. Intermediate scrutiny was used because, unlike personal solicitation, there was nothing misleading about the form or content of the speech. *Id.* at 205-207.

Thereafter, this Court *upheld* a law regulating the sale of drug paraphernalia which used "the proximity of drug-related literature as an indicium" that paraphernalia was being marketed for use with illegal drugs. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982). To the extent that the law chilled the display of literature, this Court re-affirmed that "speech proposing an illegal transaction" has no First Amendment protection. *Id.* citing *Pittsburgh Press*.

Under the "Economic Interests" Approach, the first two rules of the "Common Sense" Approach were merged:

> Restrictions upon truthful, non-misleading expression related solely to the lawful economic interests of the speaker and its audience is commercial speech which is categorically subject to intermediate scrutiny.

Meanwhile, the last two rules of the "Common Sense" Approach mandating rational basis review for false and misleading commercial speech, as well as speech proposing illegal commercial transactions apparently survived. *Central Hudson*, 447 U.S. 557, 563-564 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.") (citations omitted); accord, *Hoffman Estates*.

But in a frank acknowledgment this Court recognized that its jurisprudence did "not afford precise guidance to the bar and the courts" as to the admittedly "developing area of the law." *R.M.J.*, 455 U.S. 204, n. 16.

3. The "Multi-Factor" Approach

In 1983, the category of commercial speech was seemingly narrowed when this Court added additional factors to the "Economic Interests" Approach. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) (economic motivation "would clearly be

insufficient by itself to turn the materials into commercial speech").

The "common sense" definition of commercial speech as that which does *no more than* propose a commercial transaction was invoked, but distinguished as merely the "core notion of commercial speech." *Bolger* at 64-66.

This Court then announced a new multi-factor test for determining whether speech that does *more* than propose a commercial transaction may nevertheless be classified as commercial speech. *Bolger* at 66-67 (considering whether the publication was "conceded" to be commercial, made "reference to a specific product," and whether speaker had "economic motivation" for publishing); and *id.* at 67-68 (holding that "[t]he combination of *all* these characteristics" provided "strong support" for conclusion that a publication about venereal disease that mentioned a condom manufactured by the publisher was commercial) (emphasis in original).

Thus, the "Economic Interests" rule was split into two new rules:

1. Restrictions upon truthful, non-misleading speech which does *no more than* propose a lawful commercial transaction (*i.e.*, "core" commercial speech) are reviewed under intermediate scrutiny.

2. Restrictions upon other speech may be reviewed under intermediate scrutiny if certain factors indicate that the speech is commercial (*e.g.*, the

speech is conceded to be commercial, makes reference to a specific product, and is made by someone with an economic motivation for the publication).

For years after *Bolger*, this Court did not have occasion to distinguish between commercial and non-commercial speech. But when it finally did, this Court openly questioned whether "economic motive" was a reliable indicator of commercial speech. *Riley v. Nat. Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988) ("It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. . . .").

However, rather than rejecting the "Multi-Factor" Approach, this Court simply avoided the issue. *Id.* at 796 ("assuming, without deciding" that speech related to a "professional fundraiser's profit from the solicited contribution" was commercial "in the abstract").

4. The "Dual Analysis" Approach

A fourth approach was utilized by this Court in the midst of developing the "Economic Interests" Approach.

A response to Justice Stevens' concurrence in *Central Hudson* suggested that protecting speech which combines commercial and noncommercial elements "would blur further the line the Court has sought to draw in commercial speech cases" and "the State retains the power to insure that the stream of

commercial information flows *cleanly* as well as freely." *Central Hudson*, 447 U.S. 557, 563, n. 5 (emphasis added, internal quotes and brackets omitted). In other words, messages combining commercial and noncommercial speech were unprotected because they could not be easily categorized; for the sake of analytical clarity (and judicial convenience) government could act as editor-in-chief and require speakers to self-cleanse (*i.e.*, censor or segregate) their messages into purely noncommercial publications.

Soon thereafter, this Court struck down a law that prohibited all billboards, except those which "advertised goods or services available on the property where the sign is located." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981).

In *Metromedia,* the recently espoused "Economic Interests" Approach was ignored, and a new gloss was put on "the common-sense" distinction; the "legal distinction" was subtly redefined as "speech proposing a commercial transaction." *Id.* at 506; and *id.* at 507 (explaining "commercial price and product advertising" is different than "ideological communication").

The deceptively familiar sounding definition was narrower than "expression related solely to the economic interests of the speaker and its audience." But it was significantly broader than speech which "does *no more than* propose a commercial transaction" since it ostensibly *included* commercial proposals that are combined with noncommercial messages.

On its face, the San Diego law regulated both commercial and noncommercial speech. *Metromedia* at 504 ("although the bulk of their business consists of offsite signs carrying commercial advertisements, their billboards also convey a substantial amount of noncommercial advertising"); 496 (same); see also, *id.* at 525, n. 4 (Brennan, J., concurring in judgment) (quoting some of the noncommercial messages).

But in an unprecedented move, this Court stated that *both* the *Central Hudson* test and strict scrutiny should be applied to the same law. *Metromedia* at 504-505 ("Because our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech, in evaluating appellants' contention we consider separately the effect of the ordinance on commercial and noncommercial speech.").

A five justice majority upheld the restrictions on offsite commercial advertising. *Id.* at 507-512. But a six justice majority concurred in the judgment that the entire law was nevertheless facially invalid. *Id.* at 512-517, 521 (plurality opn.) ("it is unconstitutional on its face") and 524-534, 540 (conc. opn.) ("I would reverse the decision of the California Supreme Court").

Justice Brennan pointedly criticized the mode of analysis used in the lead opinion. *Id.* at 522 (Brennan, J., concurring in judgment, joined by Blackmun, J.) ("I believe the plurality's bifurcated approach itself raises serious First Amendment problems and relies

on a distinction between commercial and noncommercial speech unanticipated by our prior cases.") and *id.* at 534-540 (discussing the problems).

For years, the unprecedented "Dual Analysis" Approach of *Metromedia* was virtually ignored by this Court. Then in 1988, speaking through Justice Brennan, this Court seemingly disavowed the "Dual Analysis" Approach without mentioning *Metromedia* by name:

> [W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

Riley, 487 U.S. 781, 796.

However, to paraphrase Mark Twain, any report of the demise of the "Dual Analysis" Approach was clearly premature. The following year, with nary a word about the other approaches, this Court resurrected the *Metromedia* definition of commercial speech. *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469 (1989).

In *Fox* the rule that a commercial message *does no more than* propose a commercial transaction was

once again slyly absent. Moreover, for the first (and last) time since *Metromedia*, this Court indicated that both *Central Hudson* analysis and strict scrutiny should be utilized to determine the constitutionality of a single regulation.

At issue was the validity of a college dormitory regulation as applied to prospective Tupperware parties. This Court stated, "There is no doubt that the AFS 'Tupperware parties' the students seek to hold 'propose a commercial transaction,' which is the test for identifying commercial speech. . . ." *Id.* at 473-474, and see, *id.* at 472 (party "consists of demonstrating and offering products for sale to groups of 10 or more prospective buyers").

But this Court also acknowledged that they did *more*. *Id.* at 474 ("They also touch on other subjects, however, such as how to be financially responsible and how to run an efficient home."). Nevertheless, this Court characterized the speech "as a whole" as commercial. *Fox* at 473-474.

This Court distinguished *Riley* by the fact that the commercial speech there was "'inexplicably intertwined' because the state law *required* it to be included." *Fox* at 474.

However, after upholding the restriction as-applied to prospective Tupperware parties, this Court next recognized that the regulation "must be deemed to reach some noncommercial speech" because the regulation also applied to "tutoring" and "job counseling" if "provided (for a fee) in students' dormitory

rooms" and the information conveyed by such activities did not plausibly constitute commercial speech. *Fox* at 482 ("While these examples consist of speech for a profit, they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech. . . .").

For procedural reasons, this Court remanded the case back to the lower courts to determine the merits in the first instance. *Fox* at 485-486.

The following rules can be synthesized from the "Dual Analysis" Approach:

1. Restrictions upon truthful non-misleading speech proposing a lawful commercial transaction are analyzed under intermediate scrutiny.

2. Restrictions upon truthful, non-misleading speech which does *more than* propose a lawful commercial transaction (*i.e.*, commercial speech which is combined with noncommercial speech) are also analyzed under intermediate scrutiny – unless the law requires the inclusion of content, or the speech taken as a whole is deemed by enforcement officers and judges to be noncommercial under unspecified standards.

3. To ensure full First Amendment protection (strict scrutiny), noncommercial messages must be communicated independently of messages that propose a commercial transaction.

The revival of the "Dual Analysis" Approach was hardly celebrated. A few years later this Court,

including the author of *Fox*, expressed serious doubt about the propriety of laws which require government enforcement officers to distinguish between commercial and noncommercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419-423 (1993).

In *Cincinnati* the characterization of the speech was not at issue. *Id.* at 416 ("respondents do not challenge their characterization as 'commercial speech'"). Nevertheless, this Court spent five pages pointing out "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category" and ultimately concluded that "the difference is a matter of degree." *Id.* at 419-423.

Notably, this Court questioned the efficaciousness of the *Fox* test. *Id.* at 423 ("Under the *Fox* test it is clear that much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents' promotional publications is not what we have described as 'core' commercial speech.").

And most significantly, at the end of its *dicta* this Court noted that the commercial-noncommercial distinction "raises some of the same concerns" about arbitrariness faced in past cases and "is by no means clear." *Id.* at 423, n. 19 (citing, among others, Justice Brennan's concurrence in *Metromedia*, 453 U.S. 490, 536-537).

5. The "Special Care" Approach

After *Fox*, this Court reviewed a law which forbade publishing the price of alcohol offered for sale *via* newspapers. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 493 (1996). This Court struck down the law because the government "failed to carry its heavy burden of justifying its complete ban on price advertising. . . ." *Id.* at Part VIII, p. 516 (Stevens, J., joined by Scalia, Kennedy, Souter, Ginsburg, J.J.). However, no mode of analysis attracted a majority.

In Part III, a plurality reiterated that this Court has analyzed "blanket bans" with "special care" and that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was *deceptive* or *related to unlawful activity*." *Id.* at 500 (Stevens, J., joined by Kennedy, Souter and Ginsburg, J.J.) (emphasis added) quoting *Central Hudson* at 447 U.S. 566, n. 9.

In Part IV, a plurality argued that the deferential *Central Hudson* test should not be applied to *all* speech which qualifies as commercial under the *Fox* test:

> As our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself

> dictate the constitutional analysis that should apply to decisions to suppress them.

Id. at 501 (emphasis in original). The plurality went on to argue that "truthful, non-misleading commercial messages" must be scrutinized with "special care" even if the communication "does no more than propose a commercial transaction." *Id.* at 501-504.

To the extent that "special care" means strict scrutiny, the "Special Care" Approach appears identical to the "Common Sense" Approach of the late 1970's.

6. The "Comprehensive Regulation" Approach

This Court has also announced a "Comprehensive Regulation" Approach that has been used to analyze regulations which coerce farmers to fund generic advertising. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Since the approach has no apparent applicability to this case it will not be discussed.

B. Existing Doctrine Has Been Continuously Criticized by Members of this Court

Review of constitutional questions is appropriate when criticism or doubt begins to permeate opinions of members of this Court. *Cf. Payne v. Tennessee*, 501

U.S. 808, 829 (1991); *e.g.*, *Virginia Pharmacy*, 425 U.S. 748, 759 and n. 16 (recognizing *Valentine* Approach "had come under criticism or was regarded as of doubtful validity by Members of the Court, [and] was avoided" in a recent case).

Here, "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. . . ." *Thompson v. Western States Medical Center*, 535 U.S. 357, 367-368 (2002) citing *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); *44 Liquormart*, 517 U.S. 484, 501, 510-514 (Stevens, J., joined by Kennedy and Ginsburg, J.J.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); and *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). See also, *Cincinnati*, 507 U.S. 410, 431-438 (Blackmun, J., concurring).

Moreover, this Court has completely avoided the Commercial Speech Doctrine during the last several years, perhaps in recognition of the dystopian state of the law. *E.g.*, *44 Liquormart*, 517 U.S. 484, 518 (Scalia, J., concurring in the judgment) ("I am not disposed to develop new law, or reinforce old, on this issue. . . .").

C. The Ninth Circuit Approach Conflicts with Other Circuits and the California Supreme Court

Review is warranted because the Ninth Circuit has decided an important question of federal law in a way that conflicts with another circuit court, or state court of last resort. Rule 10(a).

Despite this Court's own recognition of doctrinal problems, even the Ninth Circuit has lacked the audacity to rule that the standards articulated by this Court violate Due Process, stating, "sufficient guidance in categorizing speech as commercial or noncommercial is provided by various decisions of the Supreme Court" and that if those definitions do not provide appropriate standards "it is hard to imagine what would." *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 613 (CA9 1993) followed in *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 816 (CA9 2003); *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 902, 904 (CA9 2007); and *Maldonado IV*, 556 F.3d 1037, 1045-1046.

But since this Court has merely criticized – not overruled – the various approaches it has articulated, each jurisdiction has had to speculate and surmise what approach to use in particular cases. Such conjecture has resulted in lack of predictability, and lack of uniformity.

In billboard cases, the Ninth Circuit has opted for the "Dual Analysis" Approach. *Mesa*, 997 F.3d 604,

610 (although "somewhat uneasy" about the continued validity of the commercial-noncommercial distinction after *Cincinnati*, "we will follow the Supreme Court's example in *Metromedia* . . . and consider separately the effect of the codes on commercial and noncommercial speech").

The Fourth Circuit rejected a vagueness challenge by holding the commercial-noncommercial distinction should be made under the "Economic Interests" Approach. *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269, 1273 (CA4 1986) citing *Central Hudson*, 447 U.S. 557, 561.

The Seventh Circuit rejected a vagueness challenge by inventing its own "Fundamental Purpose" Approach. *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1116 (CA7 1999) (defining "paradigmatic commercial speech" as speech with a "fundamental purpose" to "propose an economic transaction") citing *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 684 (CA7 1998).

The Tenth Circuit rejected a vagueness challenge by holding the commercial-noncommercial distinction should be made under the "Multi-Factor" Approach. *National Advertising Co. v. City and County of Denver*, 912 F.2d 405, 410 (CA10 1990) citing *Bolger*, 463 U.S. 60, 66.

The California Supreme Court, on remand in *Metromedia*, declined to judicially reform or sever the San Diego ordinance so as to prohibit only offsite commercial speech because doing so "would compel

the city to distinguish between commercial and noncommercial speech, a task rife with constitutional enigmas. . . ." *Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 183 (1982); see also, *id.* at 190 ("Such an ordinance . . . would require the city to police the content of advertising messages, and would compel it to distinguish commercial from noncommercial speech – an extremely difficult task, and one which presents serious constitutional problems.") citing *Metromedia*, 453 U.S. 490, 536-540 (Brennan, J., concurring in judgment).

California's intermediate appellate courts subsequently adopted the Fourth Circuit's "Economic Interests" Approach, holding "that there is now enough judicial guidance in this area that practical application of the distinction will not be unduly burdensome." *City and County of San Francisco v. Eller Outdoor Advertising*, 192 Cal.App.3d 643, 665 (1987) citing *City of Salinas v. Ryan Outdoor Advertising*, 189 Cal.App.3d 416, 429-430 (1987) following *Major Media*, 792 F.3d 1269, 1273.

But the California Supreme Court has subsequently invented its own "Who is Speaking?" Approach for making the commercial-noncommercial distinction which "requires consideration of three elements: the speaker, the intended audience, and the content of the message." *Nike*, 27 Cal.4th 939, 960 (describing it as a "limited-purpose test" to be used "*when a court must decide whether particular speech may be subjected to laws aimed at preventing false*

advertising or other forms of commercial deception") (emphasis in original).

The California Supreme Court purported to base its new test on *Bolger* (*i.e.*, the "Multi-Factor" Approach). *Nike*, 27 Cal.4th 939, 960-962; see also, *id.* at 957 (observing *Bolger* "not only rejected the notion that any of these factors is *sufficient* by itself, but it also declined to hold that all of these factors in combination, or any one of them individually, is *necessary* to support a commercial speech characterization") (emphasis in original).

Nike is binding in state court. *U.D. Registry, Inc. v. State*, 144 Cal.App.4th 405, 420 (2006) (holding "the bright line rule – that commercial speech is only that which proposes a commercial transaction" has been "superseded by subsequent authority" and that the "controlling discussion in this regard is the analysis of our Supreme Court in *Nike*. . . ."); see also, *People v. Crittenden*, 9 Cal.4th 83, 120, n. 3 (1994) ("we are not bound by decisions of the lower federal courts, even on federal questions") and *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 455 (1962) (California Supreme Court decisions "are binding upon and must be followed by all the state courts of California").

Thus, Maldonado is subject to both the California and Ninth Circuit approaches, depending upon whether an action is filed in state or federal court.

D. Summary

The lack of a settled standard for making the commercial-noncommercial distinction, criticism by members of this Court, and splits among the circuits and California Supreme Court provide compelling reasons for this Court to grant review.

Embraced within this issue is whether there should be a commercial-noncommercial distinction at all. On the merits, petitioner will argue that there is no textual or historical basis for the commercial-noncommercial distinction and that all of the approaches articulated to date are too vague, overbroad, or arbitrary. But if any of said approaches must be adopted, then it should be the "Common Sense" Approach.

II. THIS COURT SHOULD REVIEW WHETHER THE COMMERCIAL-NONCOMMERCIAL DISTINCTION IS OVERBROAD AND CONTENT-BASED

Review of the following issue is warranted because the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, and in a way that conflicts with other circuits. Rules 10(c) and (a).

A. The Supreme Court Rules

In *Cincinnati* this Court reviewed an ordinance that generally banned commercial newsracks, but

exempted noncommercial newsracks. *Cincinnati*, 507 U.S. 410, 414, n. 2 and 3. This Court assumed *arguendo* that the ban only applied to "core" commercial speech, and therefore analyzed the ban under the *Central Hudson* test. *Id.* at 424. But in response to the dissent of Chief Justice Rehnquist, this Court explicitly held that its prior decision in *Metromedia* did not control the case before it:

> THE CHIEF JUSTICE is correct that seven Justices in the *Metromedia* case were of the view that San Diego could completely ban offsite commercial billboards for reasons unrelated to the content of those billboards. Those seven Justices did not say, however, that San Diego could *distinguish* between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns. That question was not presented in *Metromedia*, for the regulation at issue in that case did not draw a distinction between commercial and noncommercial offsite billboards; with a few exceptions, it essentially banned *all* offsite billboards."

Cincinnati, 507 U.S. 410, 425, n. 20 (emphasis in original).

As a matter of first impression, this Court struck down the law because there was no "reasonable fit" between the restriction and the government's aesthetic and safety interests; the commercial-noncommercial nature of the publications displayed within the

newsracks had *nothing whatsoever* to do with aesthetics or safety. *Cincinnati* at 425-428.

Importantly, this Court also held that the law did not qualify as a "time, place, and manner" restriction because the distinction was content-based. *Cincinnati* at 428-431; esp. *id.* at 429 (since "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech" and because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack" therefore "by any commonsense understanding of the term, the ban in this case is 'content-based.' ").

B. The Ninth Circuit Rules

The first Ninth Circuit case to apply *Cincinnati* ignored footnote 20 of the opinion and errantly relied on *Metromedia* to hold that there *was* a "reasonable fit" between a law that generally banned commercial billboards, but exempted noncommercial billboards. *Mesa*, 997 F.2d 604, 611 ("Like the ordinance in *Metromedia*, which a majority of Justices concluded easily met this criterion, the sign codes here go 'no further than necessary' in seeking to accomplish the cities' goals.")

Then, in a further legal blunder, the Ninth Circuit ruled that any restrictions upon noncommercial speech should be analyzed as a "time, place, and manner" restriction because "[t]he sign codes are content neutral." *Mesa* at 612.

Subsequent Ninth Circuit cases have followed *Mesa. Ackerley Communications of the Northwest Inc. v. Krochalis*, 108 F.3d 1095, 1098 (CA9 1997); *Clear Channel*, 340 F.3d 810, 813-816; *Beaumont*, 506 F.3d 895, 905; *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 911-914 (2009); and *Maldonado IV*, 556 F.3d 1037, 1046-1048 citing *Metro Lights* at 912, 914.

Here, the erroneous law of the circuit foreclosed petitioner from arguing the Act was overbroad (*i.e.*, not a "reasonable fit") under *Central Hudson*.

Moreover, the erroneous precedent deeming commercial-noncommercial distinctions as "content-neutral" doomed petitioner's prior restraint and equal protection arguments because the panel applied the wrong level of scrutiny. *Maldonado IV*, 556 F.3d 1047-1048 reviewing the state court injunction under *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763-770 (1994) and equal protection argument under a Ninth Circuit case citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994).

The largest circuit in the nation has adopted the wrong legal standards to apply in commercial speech cases brought under equal protection and prior restraint theories.

Equal protection precedent requires *strict* scrutiny of laws which discriminate based upon subject-matter or speaker identity.[1] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-231 (1987) (tax exemption for periodicals based upon subject-matter); *Carey v. Brown*, 447 U.S. 455, 459-463 (1980) (picketing ban exempting labor picketing); accord, *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (CA1 1996) (billboards "grandfathered" based upon subject-matter of prior displays).

The *Turner* standard is not applicable because this Court was careful to point out that it used the "intermediate" scrutiny test because the law was "content-neutral." *Id.* at 643-655. Moreover, there was an "important technological difference" between cable television and other media. *Turner* at 656.

Meanwhile, prior restraint precedent establishes that state nuisance statutes (and injunctions based thereon)[2] which restrain even "unprotected" categories of speech prior to publication are subject to strict scrutiny; the government may not declare

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[1] Even as to "unprotected" categories of speech, sub-classes may not be created unless "the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388-389 (1992) (*e.g.*, a sub-class of commercial speech could be regulated differently if there were a greater "risk of fraud.").

[2] California injunctions may be collaterally attacked. *In re Berry*, 68 Cal.2d 137, 147 (1968).

certain categories of speech to be a nuisance *per se* and then restrain future publications by way of an injunction enforced by the judicial contempt power. *Near v. Minnesota*, 283 U.S. 697, 711-715 (1931) (defamatory speech) and *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 315-317 (1980) (obscene speech).

The *Madsen* standard is not applicable because it only applies to "content-neutral" injunctions. *Madsen*, 512 U.S. 753, 762-775. *Madsen* is also distinguishable because it enjoined "expressive conduct" such as blocking ingress and egress to, and shouting near, medical clinics. *Id.* at 769 and 772-773.

However, to the extent *Madsen* cannot be distinguished, it should be overruled for the reasons stated in the dissent. *Madsen* at 784-815 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Kennedy and Thomas, J.J.).

The aptly described "intermediate-intermediate" scrutiny is supposedly "somewhat more stringent" than regular intermediate scrutiny in that the standard "requires that the restriction 'burden no more speech than necessary to serve a significant government interest.'" *Madsen*, 512 U.S. 753, 791 (dissent). However, here the malleable standard failed to eliminate the very same distinction that this Court previously struck down under the *Central Hudson* test.

Indeed, "[t]he proposition that injunctions against speech are subject to a standard indistinguishable

from (unless perhaps more lenient in its application than) the 'intermediate scrutiny' standard . . . used for 'time, place, and manner' legislative restrictions" was a dangerous idea to legitimize. *Madsen* at 815 (dissent). Moreover, it has proven an expedient way for judges to silence unpopular speakers such as abortion protesters and billboard owners.

The Ninth Circuit erred by expanding *Madsen* beyond its facts, and it is wrong to subject Maldonado to prior restraint simply because he was previously adjudicated to have published messages which violated the old (unconstitutional) version of the Act.

C. Other Circuits

Contrary to the Ninth Circuit, and in light of footnote 20 of the *Cincinnati* case, the Seventh Circuit has held that *Metromedia* "is not dispositive" as to whether the commercial-noncommercial distinction reasonably fits aesthetic and safety concerns. *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1113-1115 and n. 16. However, the Seventh Circuit did not decide the underinclusivity issue itself. *Id.* at 1116 (issue forfeited).

The Third Circuit has also held that *Metromedia* is not binding, but did so because it was "unable to derive a governing standard from the splintered opinions." *Rappa v. New Castle County*, 18 F.3d 1043, 1053-1061 (CA3 1994); and *id.* at 1079 (Alito, J., concurring). The lead opinion by Judge Becker questioned the continued validity of the portion of the

plurality opinion in *Metromedia* that suggested "content-based distinctions within the category of commercial speech were permissible." *Id.* at 1055-1056 and n. 20 citing *Cincinnati*; and *id.* at 1065, n. 35 (same). The Court then invented and applied a new "Significantly Related to Locality" test. *Id.* at 1062-1068.

Although Judge Alito concurred in the judgment and opinion because he thought it was "important for the panel to agree on a judgment and rationale," he actually preferred "a method of analysis somewhat different. . . ." *Id.* at 1079. In his view, the law swept too "broadly and indiscriminately" and could not even pass the narrow tailoring requirement of the "time, place, and manner" test. *Id.* at 1080 (noting that the law "generally prohibits signs on all property within 25 feet of the right of way of all portions of every state highway," except in incorporated and otherwise "controlled" areas.).

The Eleventh Circuit agrees that *Metromedia* is not binding, but has adopted its reasoning. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261-1262, n. 10 (CA11 2005).

III. THIS COURT SHOULD REVIEW WHETHER THE GOVERNMENT MUST PROVE, BY SUBSTANTIAL EVIDENCE, THAT COMMERCIAL SPEECH RESTRICTIONS MATERIALLY ADVANCE ITS AESTHETIC AND TRAFFIC SAFETY INTERESTS BOTH IN THE AGGREGATE AND AS-APPLIED

Review of the following issue is warranted because the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, and in a way that conflicts with another circuit. Rules 10(c) and (a).

A. The Supreme Court and Sixth Circuit

In 1993, this Court refined prong three of the *Central Hudson* test which asks whether a restriction affecting commercial speech is effective (*i.e.*, "directly advances" the government interest identified in prong two of the test). This Court adopted the "material advancement" test, and rejected the notion that effectiveness could be judged in the abstract. *Edenfield v. Fane*, 507 U.S. 761, 770-773 (1993) (the government's burden is "not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

Later, this Court stated, "It is readily apparent that this question cannot be answered by limiting the

inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 427 (1993). However, that point was overruled *sub-silentio* when this Court held that the same provision of law could "not be applied" in a different context. *Greater New Orleans*, 527 U.S. 173, 176; and *id.* at 188-189 (quoting *Edenfield* at 770-771 and concluding, "As applied to petitioners' case, § 1304 cannot satisfy [the *Edenfield*] standards.").

The *Edenfield* refinement has been followed in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-490 (1995) (prong three is "critical" for policy reasons, exemptions undermine effectiveness, and "anecdotal evidence and educated guesses" are insufficient); *44 Liquormart*, 517 U.S. 484, 516 (concluding state "failed to carry its *heavy burden* of justifying its complete ban on price advertising") (emphasis added); *Greater New Orleans*, 527 U.S. 173, 190 (legislation deemed ineffective because it was "so pierced with exemptions and inconsistencies"); and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557-561 (2001) (*dicta*) (extensive studies on tobacco use by minors indicated targeted advertising bans would be effective to curtail use of chewing tobacco and cigars among minors) and *id.* at 566 (5 ft. height restriction on chewing tobacco and cigar advertising was ineffective because children could simply "look up").

The *Edenfield* refinement is binding because inferior courts are generally bound not only by the holdings of the Supreme Court, but also by their

"mode of analysis." Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L.Rev. 1175, 1177 (1989); accord, *Miller v. Gammie*, 335 F.3d 889, 900 (CA9 2003) (*en banc*). Thus, when this Court deliberately reconsiders and announces a change in its mode of analysis, that change is generally binding on inferior courts, even if the opinion does not expressly identify and disapprove of every prior case utilizing the old mode of analysis. *Olsen v. Nebraska*, 313 U.S. 236, 244-245 (1941) (holding Nebraska Supreme Court erred when it followed an earlier opinion because later cases represented "more than scattered examples" of exceptions to the old rule; they represented "a basic departure from the philosophy and approach" of the earlier cases).

The Sixth Circuit recognized as much in a case involving automobile "for sale" signs. *Pagan v. Fruchey*, 492 F.3d 766, 775, n. 8 (CA6 2007) (*en banc*) ("Finally, even assuming *Metromedia* is applicable to this case, *Edenfield* – coming more than a decade later – must be read as a refinement of the *Central Hudson* framework relied upon in *Metromedia*. *Edenfield*, not *Metromedia*, requires the result here.")

B. The Ninth Circuit

The Ninth Circuit has adopted the "material advancement" refinement in non-billboard contexts. *Ballen v. City of Redmond*, 466 F.3d 736, 744 (CA9 2006) (portable sandwich board signs).

But in billboard cases, the Ninth Circuit has expressly rejected the argument that this Court "has imposed a greater evidentiary burden on a [government entity] trying to justify a restriction on commercial speech." *Krochalis*, 108 F.3d 1095, 1097-1098; *id.* at 1099 ("we hold that *Metromedia* continues to control the regulation of billboards"); and *id.* at 1099-1100 ("*As a matter of law* Seattle's ordinance . . . is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests.") (emphasis added).

Mesa and *Krochalis* have been followed in subsequent Ninth Circuit cases. *Clear Channel*, 340 F.3d 810, 814-815 and *id.* at 816 ("under *Metromedia*, the City need only show that the goal of bringing offsite signs into greater compliance with building codes is itself legitimate"); *Metro Lights*, 551 F.3d 898, 904; and *Maldonado IV*, 556 F.3d 1037, 1046, n. 3 ("The basis for the sign ban relates to signs in the aggregate, not Maldonado's billboard in particular.").

Invoking another laudable rule of *stare decisis* (*i.e.*, that only this Court has "the prerogative of overruling its own decisions"), the Ninth Circuit has purported to distinguish billboard cases by parroting the "talismanic phrase"[3] that billboard law is "a law

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[3] *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 75-76 (1961) (Warren, C.J., dissenting) (criticizing the majority for invoking "a talismanic phrase" that "in no way, explains why moving pictures should be treated differently than any other

(Continued on following page)

unto itself" and that "*Metromedia* remains the leading decision in the field." *Mesa*, 997 F.2d 604, 610 quoting *Metromedia*, 453 U.S. 490, 501; see also, *Krochalis* at 1099 (accord, quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) and *Metro Lights*, 551 F.3d 898, 911 (refusing to follow *Greater New Orleans* for same reason).

The problem with the Ninth Circuit's analysis is that it fails to acknowledge that this Court *has* "exercised its prerogative" to both explicitly alter its mode of analysis, and to explicitly *distinguish* the *Metromedia* case. See discussion (above), Part II, Sections A and C discussing footnote 20 of *Cincinnati* and holdings of other circuits that *Metromedia* does not constitute binding authority.

CONCLUSION

The time has come to bid farewell to the Commercial Speech Doctrine – or at least to settle on a workable approach.

Government has a legitimate interest in regulating the size and location of permanent sign structures, but the First Amendment prohibits (or at

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form of expression" and "why moving pictures should be denied the protection against censorship – 'a form of infringement upon freedom of expression to be especially condemned' ").

least should prohibit) government from censoring what messages are displayed on those structures.

The constitutional enumeration of the Freedoms of Speech and Press means that the power to decide what messages are appropriate for publication has been reserved to the People.

Respectfully submitted,

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September 22, 2009

556 F.3d 1037

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANO MALDONADO,

Plaintiff-Appellant,

v.

JEFF MORALES, in his capacity as Director of the California Department of Transportation,

Defendant,

and

WILL KEMPTON, in his capacity as Director of the California Department of Transportation,

Defendant-Appellee.

No. 06-15657

D.C. No. CV-02-03167-CRB

NANO MALDONADO,

Plaintiff-Appellant,

v.

WILL KEMPTON, in his capacity as Director of the California Department of Transportation,

Defendant-Appellee.

No. 07-15535

D.C. No. CV-02-03167-CRB

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
August 13, 2008 – San Francisco, California

Filed February 25, 2009

Before: Eugene E. Siler, Jr.,* M. Margaret McKeown, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

Nano Maldonado has raised a number of constitutional challenges to the California Outdoor

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Advertising Act. Cal. Bus. & Prof. Code § 5200, et seq. As a consequence of a legislative amendment in 2008, the Act bars offsite commercial advertising but does not restrict non-commercial speech. Cal. Bus. & Prof. Code § 5275. Although some of Maldonado's claims are now moot because of this amendment, he continues to challenge application of the Act to his effort to display off-premises advertising on a highway billboard. This appeal is Maldonado's second trip to our court and requires us, once again, to reiterate our commercial speech jurisprudence involving billboards. We dismiss as moot Maldonado's appeal from the district court's injunction and affirm the district court's grant of summary judgment on his other claims.

I. Background

Maldonado has had a long-running dispute with the California Department of Transportation ("Caltrans") over the use of a billboard on his property. In the early 1990s, he purchased property in Redwood City, California, that is adjacent to U.S. Highway 101. This land is in an area of Highway 101 that has been classified as "landscaped freeway." In 1993, Maldonado applied to Caltrans for a permit to use his billboard for offsite advertising. Because California's Outdoor Advertising Act ("COAA") bars property owners from using billboards along a landscaped freeway to advertise for offsite businesses, Caltrans denied the application. *See* Cal. Bus. & Prof. Code §§ 5440, 5442. Maldonado's efforts to skirt the

offsite advertising ban have resulted in lengthy litigation at the state and federal level over the last ten years.

After Maldonado continued using the billboard for offsite advertising despite numerous citations, Caltrans sued him in California state court for nuisance. *See People v. Maldonado,* 86 Cal. App. 4th 1225, 1228-29 (Cal. Ct. App. 2001). The state court trial judge found in favor of Caltrans and enjoined Maldonado from continuing to violate the COAA. *Id.* at 1229-30. The injunction barred Maldonado from: (1) "posting or displaying any advertising on his billboard without first having obtained from [Caltrans] either a permit for outdoor advertising, or an exemption from or waiver of the permit requirement;" (2) "posting or displaying any on premise advertising which does not direct the viewer to the billboard location for purposes of conducting business;" (3) "posting or displaying any on premise advertising for activities not conducted on [his] premises;" and (4) "posting or displaying any on premise advertising for products or services which are only incidental or secondary to the principal business activity conduct on [his] premises." *Id.* at 1233-35 (internal quotations and citations omitted). The state court of appeals upheld all but the first of these prohibitions. *Id.*

Despite the injunction, Maldonado persisted in using his billboard for offsite advertising and was twice cited for contempt. He then sued in federal court, alleging the COAA violated the First Amendment, both facially and as applied to him. The district

court dismissed the case on procedural grounds. We reversed that dismissal. *See Maldonado v. Harris* (*"Maldonado II"*), 370 F.3d 945, 956 (9th Cir. 2004). On remand, the district court held that the COAA unconstitutionally privileged commercial speech over non-commercial speech because it permitted onsite commercial speech but barred onsite non-commercial speech. *Maldonado v. Kempton* (*"Maldonado III"*), 422 F. Supp. 2d 1169, 1178 (N.D. Cal. 2006). The district court enjoined enforcement of the COAA against non-commercial speech on billboards where onsite advertising is allowed. *Id.* at 1178. The district court later found that the COAA, as amended by the injunction, is constitutional and granted summary judgment against Maldonado on his other claims.

Maldonado now challenges the district court's injunction and summary judgment ruling. He argues that the district court's injunction was not an appropriate remedy for the statute's unconstitutional preference for commercial speech. He claims that the COAA is overbroad and vague, that it imposes unconstitutional prior restraints on speech, that it violates equal protection, and that it violates substantive due process. He also claims that the state court injunction barring him from violating the COAA imposes a separate unconstitutional restraint on his First Amendment rights.

II. Analysis

A. Jurisdiction

Before addressing Maldonado's substantive claims, we first resolve three threshold issues: whether the amendment to the COAA moots Maldonado's claims, whether he has standing to raise his claims, and whether his claims about the criminal enforcement provisions are ripe. *See Kescoli v. Babbitt,* 101 F.3d 1304, 1308 (9th Cir. 1996) ("If the appeal is moot, we lack jurisdiction."); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 88-89 (1998) (standing is a jurisdictional question that ordinarily must be resolved before addressing the merits); *Texas v. United States,* 523 U.S. 296, 301-302 (1998) (courts should not reach the merits of unripe issues).

1. Mootness

On January 1, 2008, after the district court's injunction and after the two appeals consolidated in this case were filed, the California legislature amended the COAA. The new section, § 5275, reads:

> Notwithstanding any other provision of this chapter, the director may not regulate non-commercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter.

Cal. Bus. & Prof. Code § 5275.

With this amendment, the COAA now exempts non-commercial speech from regulation by Caltrans. The question then is whether this statutory change moots Maldonado's appeal. Mootness is "'the doctrine of standing set in a time frame.'" *Abdala v. I.N.S.*, 488 F.3d 1061, 1063 (9th Cir. 2007) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). "A statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Native Village of Noatak v, Blatchford,* 38 F.3d 1505, 1510 (9th Cir. 1994).

Before enactment of this new provision, the district court held that the COAA impermissibly favored commercial over non-commercial speech, because it provided an exception only for onsite commercial advertising and not for non-commercial messages. The district court remedied this constitutional infirmity by enjoining Caltrans from enforcing the COAA against non-commercial speech: "the Court will enjoin the State from enforcing COAA to prohibit non-commercial speech wherever the Act permits commercial speech." *Maldonado III,* 422 F. Supp. 2d at 1178.

Section 5275 incorporates the same solution to the constitutional problem that the district court implemented via the injunction, specifically carving out non-commercial speech from regulation. Cal. Bus. Prof. Code § 5275. Now that the statute has been amended to exempt non-commercial speech, the

injunction is moot.[1] *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 465 n.8 (1982) (noting that the amendment of a law removing sections declared unconstitutional by a district court mooted that court's injunction).

Despite the changes to the COAA, Maldonado argues that because Caltrans stated that it will not change its enforcement policy, his claims are not moot. However, what Caltrans actually said is that it never enforced the COAA against non-commercial speech, even when the text of the law permitted it to do so. This statement was not a threat to flout the new law, but rather a promise to follow it.

Four of Maldonado's claims against the COAA were predicated on the COAA *as reformed by the district court:* (1) the COAA is overbroad and vague; (2) the COAA is enforced via unconstitutional prior restraints; (3) the grandfathering provision violates equal protection; and (4) the COAA violates the suppression doctrine and substantive due process. These claims do not depend on the lack of statutory exception for non-commercial speech and thus remain live controversies.

Maldonado's claim that the state court injunction bars him from exercising his First Amendment Rights

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[1] Maldonado's dispute over the injunction centers on the multiple claims relating to the district court's allegedly improper reformation of the statute, and claimed failure to comply with Federal Rule of Civil Procedure 65(d).

is also unaffected by the changes to the COAA. Although the purpose of that injunction was to bar Maldonado from continued violation of the COAA, the language of the injunction bars him from engaging in offsite advertising on his billboard, not simply from violating the COAA. Therefore, the change to the COAA itself has no effect on this aspect of the state court injunction. This claim is addressed below in our analysis of prior restraint.

2. Standing

We next address Caltrans arguments that Maldonado lacks standing to pursue his claims. Caltrans posits that because a Redwood City ordinance also includes billboard restrictions, some of Maldonado's claims are not redressable. *See* Redwood City Sign Ordinance § 3.114 (2000) (amended 2007) (prohibiting offsite advertising subject to enumerated exceptions such as community activity signs, open house signs, garage sale signs, political signs and public event signs).[2] Caltrans argues that even if Maldonado were to prevail on his constitutional claims, the city ordinance would still prohibit Maldonado's advertising, hence obtaining relief in this court would be fruitless.

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[2] In its brief, Caltrans cited to the statute enacted in 2000 but later submitted a letter alerting the court to a statutory change that clearly exempted non-commercial messages. The amended version of the statute is codified at Redwood City Code §§ 3.57-3.61, 3.71-3.72.

Caltrans's argument might have merit if the Redwood City prohibitions were clearly identifiable, enforceable, and distinct from the federal challenge to the amended COAA. The Seventh Circuit considered such a circumstance in *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge,* 9 F.3d 1290 (7th Cir. 1993). As we explained in a later case analyzing *Harp,* "'[a]n injunction against the portions of the sign and zoning codes that [Harp] has challenged [i.e., the off-site sign ban] would not let it erect the proposed sign; the village could block the sign simply by enforcing another, *valid* ordinance [i.e., the size and height restrictions] already on the books.'" *Get Outdoors II, L.L.C. v. City of San Diego,* 506 F.3d 886, 893 (9th Cir. 2007) (quoting *Harp,* 9 F.3d at 1292) (alterations in original) (emphasis added).

When evaluating redressability, the key question is whether the harm alleged by the plaintiff is *likely* to be alleviated by a ruling in its favor. *See Harp,* 9 F.3d at 1292 ("Law like life deals in probabilities. A rule reducing the probability of success causes a concrete injury for the same reason that an . . . option to buy stock sells at a positive price."). Maldonado's constitutional challenge to the COAA applies with equal force to the similarly-worded Redwood City ordinance, which also bans offsite commercial advertising. Although the Redwood City ordinance might present another obstacle in Maldonado's path were he to prevail in this litigation, it is one that a favorable ruling here would likely allow him to surmount. Therefore, the Redwood City Ordinance does not

defeat Maldonado's standing to challenge the constitutionality of the COAA.

Caltrans also questions Maldonado's standing to challenge the COAA provisions that were not applied to him, such as COAA's grandfathering provision, which exempted pre-existing offsite advertisements from the Act. Although plaintiffs are generally limited to enforcing their own rights, standing is broader for facial First Amendment challenges. We have long held that plaintiffs have standing to challenge exceptions as underinclusive when the exception does not apply to the plaintiff. *See Ripplinger v. Collins,* 868 F.2d 1043, 1048 (9th Cir. 1989) ("Plaintiffs . . . have standing to claim a constitutional violation because others similarly situated are exempt from the operation of a state law adversely affecting the plaintiffs."). Similarly, a plaintiff alleging that a statute is void for vagueness and overbreadth resulting in a chilling effect on speech has standing even if the law is constitutional as applied to him. *See S.O.C., Inc. v. County of Clark,* 152 F.3d 1136, 1142-43 (9th Cir. 1998). These principles are sufficiently broad to grant Maldonado standing on his First Amendment and equal protection claims.

3. Ripeness

Finally, Caltrans insists that because Maldonado has not actually been prosecuted, his complaint about the criminal provisions of the COAA, Cal. Bus. & Prof. Code § 5464, is purely hypothetical and should

not be addressed by this court. Although cast by Caltrans as a standing issue, this challenge fits more neatly into the ripeness category. Ripeness is intended to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The role of the courts is "neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies." *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

Ripeness is both a constitutional and a prudential doctrine. *Portman v. County of Santa Clara,* 995 F.2d 898, 902 (9th Cir. 1993). Under the constitutional inquiry, we look to a three-part test: (1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether there has been a threat of prosecution from the state; and (3) whether the statute at issue has previously been enforced. *Thomas,* 220 F.3d at 1138-39. In other words, a "genuine threat of enforcement" is sufficient to render a claim ripe for review. *City of Houston v. Hill,* 482 U.S. 451, 459 n.7 (1987) (citing *Steffel v. Thompson,* 415 U.S. 452, 475 (1974)). The prudential inquiry weighs "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.,* 387 U.S. at 149.

The last time Maldonado came before this court, invoking the framework described above, we held that his claims were ripe. Applying the test for constitutional ripeness, we held:

> Maldonado's suit fares well as far as the first and third factors are concerned: Maldonado alleges that his current conduct is in violation of COAA, and Caltrans has undoubtedly enforced the statute against Maldonado in the past. Although the second factor is a closer question, it also tends to favor Maldonado: while there may not have been specific threats of enforcement against his current signs, the fact that an injunction had been entered against Maldonado certainly qualifies as a threat of enforcement. We therefore conclude that Maldonado's First Amendment challenge meets the constitutional component of ripeness.

Maldonado II, 370 F.3d at 953-54 (footnote omitted). As for prudential ripeness, we held:

> Maldonado's suit meets the first prong because there has been no contention that the record needs to be developed further in order for the district court to be able to address the constitutional challenge. . . . The second factor also weighs in favor of Maldonado because withholding consideration of his claims will require him to risk being found in contempt of the state court injunction in order to be able to challenge the constitutionality of the statute.

Id. at 954. Caltrans offers nothing to change our analysis in this appeal. Maldonado appears locked in a continuing battle with the state over this billboard. The result is not hypothetical. Instead, there is a continuing cycle of contempt citations, litigation and appeals.

B. Overbreadth and Vagueness

1. Criminal Enforcement

Maldonado challenges the constitutionality of the COAA provisions that punish violations of the ban on offsite advertising as misdemeanor criminal offenses. *See* Cal. Bus. & Prof. Code § 5464. Maldonado's overbreadth claim is linked to his vagueness claim. In effect, he argues that the distinction between commercial and non-commercial speech is vague and therefore fails to give sufficient notice of the prohibited conduct and chills protected speech. Maldonado alleges the statute is overbroad because the vagueness of this distinction will result in some non-commercial speech being subjected to the COAA.

To be sure, courts must take extra care in determining whether criminal statutes are vague or "reach[ ] a substantial amount of constitutionally protected conduct" because of the heightened risk of deterring people from engaging in constitutionally protected conduct. *City of Houston,* 482 U.S. at 458. Because of the nature of criminal sanctions, "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily

on civil sanction for enforcement." *Winters v. New York,* 333 U.S. 507, 515 (1948).

The standard for unconstitutional vagueness is whether the statute "provide[s] a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams,* ___ U.S. ___, 128 S. Ct. 1830, 1845 (2008) (citing *Hill v. Colorado,* 530 U.S. 703, 732 (2000)). The settled law of this circuit is that the commercial/non-commercial and onsite/offsite distinctions are not unconstitutionally vague. *Clear Channel Outdoor, Inc. v. City of Los Angeles,* 340 F.3d 810, 814 (9th Cir. 2003) ("We have relied on *Metromedia* to uphold sign ordinances that distinguish between onsite and offsite signs when that distinction does not also prevent the erection of on-site non-commercial signs.") (citing *Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 511-14 (1981)); *Ackerley Communications of the Northwest, Inc. v. Krochalis,* 108 F.3d 1095 (9th Cir. 1997) (upholding Seattle's ban on offsite commercial advertising on billboards); *Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604, 613 (9th Cir. 1993) ("Because our First Amendment jurisprudence recognizes a distinction between commercial and non-commercial speech, government officials have to place a particular message into one or the other category for purposes of regulation. The potential difficulty of that categorization in itself does not render the regulations unconstitutional."). Because the overbreadth and chilling effect claims

are dependent on the statute's alleged unconstitutional vagueness, those claims also fail.

2. Suppression Doctrine

Maldonado claims that the COAA is a violation of the "suppression doctrine." Maldonado's brief lumped this claim in with his substantive due process claim,[3] but it is in fact a First Amendment claim premised on *City of Ladue v. Gilleo,* 512 U.S. 43 (1994). In *Ladue,* the Supreme Court held that a municipal ordinance banning nearly all types of signs, although content-neutral, was unconstitutional because it "suppress[ed] too much speech." *Id.* at 55. In essence, the suppression doctrine is an overbreadth doctrine that prevents highly restrictive yet content-neutral limitations on speech from foreclosing or nearly foreclosing an entire medium of expression:

> [W]e have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell v. City*

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[3] Maldonado's apparent substantive due process arguments, namely that the state cannot validly prohibit offsite advertising in urban areas, and "the government's asserted aesthetic and traffic safety interests" cannot overcome his liberty and property interests, miss the mark. The basis for the sign ban relates to signs in the aggregate, not to Maldonado's billboard in particular. *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 427-28 (1993). Nor do our billboard cases create an urban carve out. Rather we have consistently upheld bans in urban areas, like Los Angeles. *See, e.g., Metro Lights v. City of Los Angeles*, 551 F.3d 898, 914 (9th Cir. 2009).

> *of Griffin,* 303 U.S. 444, 451-452, 58 S. Ct. 666, 82 L. Ed. 949 (1938); handbills on the public streets, *Jamison v. Texas,* 318 U.S. 413, 416, 63 S. Ct. 669, 87 L. Ed. 869 (1943); the door-to-door distribution of literature, *Martin v. City of Struthers,* 319 U.S. 141, 145-149, 63 S. Ct. 862, 87 L. Ed. 1313 (1943); *Schneider v. State (Town of Irvington),* 308 U.S. 147, 164-165, 60 S. Ct. 146, 84 L. Ed. 155 (1939), and live entertainment, *Schad v. Mount Ephraim,* 452 U.S. 61, 75-76, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981). . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech.

Id.

The COAA does not ban all signs, or even nearly all signs, but only off premises, commercial billboards. Maldonado remains free to post any non-commercial messages or to post onsite advertising on his billboard. This regulation is substantially less restrictive than any the Supreme Court has struck down under the suppression doctrine. We have upheld similar restrictions in the past and did so just last month. *See, e.g., Metro Lights v. City of Los Angeles,* 551 F.3d 898, 914 (9th Cir. 2009). Therefore, Maldonado's suppression doctrine claim fails.

C. Prior Restraint

Under California law, violations of the COAA are public nuisances that may be enjoined by the courts. Cal. Bus. & Prof. Code § 5461. Maldonado argues that the state court injunction barring him from continuing to violate the COAA constitutes an unconstitutional prior restraint on speech. The fact that the COAA allows such prior restraints, he claims, renders it unconstitutional.

That the statute allows injunctions against speech does not itself render the COAA unconstitutional – "[n]ot all injunctions that may incidentally affect expression . . . are prior restraints." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994) (citations omitted). Content-neutral injunctions that do not bar all avenues of expression are not treated as prior restraints. *Id.*

The content-neutral injunction against Maldonado is a pointed one – it bars him from violating the COAA, namely posting offsite advertising on his billboard. *Maldonado,* 86 Cal. App. 4th at 1234; *see also Metro Lights,* 551 F.3d at 912 (holding that a similar ordinance barring offsite commercial advertising but permitting non-commercial and onsite commercial advertising is "not by its terms a content-based regulation"). The injunction does not limit his onsite advertising. Nor does it bar him from posting non-commercial messages. The injunction merely means "he may not use his billboard to direct travelers to businesses that are not located[on his

premises]." *Maldonado,* 86 Cal. App. 4th at 1234-35. In effect, the injunction does no more than provide court-ordered compliance with the statute.

The fact that the restriction is not a prior restraint does not end the inquiry. Injunctions are subject to a higher level of scrutiny than generally applicable laws:

> There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree.

Madsen, 512 U.S. at 764. Because of these differences between injunctions and generally applicable ordinances, the Supreme Court has counseled that "a somewhat more stringent application of general First Amendment principles" should be used to review injunctions. *Id.* at 765.

In *Madsen,* the Court held that the appropriate test for content-neutral injunctions was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765. *Madsen* involved non-commercial speech by anti-abortion protestors, whereas Maldonado has engaged in less protected commercial speech. Whether Madsen's stricter test for evaluating an injunction applies equally to an

injunction regulating commercial speech is a distinction not addressed by the Court. *See generally Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.") (citations omitted). However, we need not reach that issue because even under the *Madsen* test, the injunction is constitutional.

California's interest in improving aesthetics and safety along its highways is significant. *Metromedia,* 453 U.S. at 511. Maldonado repeatedly violated the ban on offsite advertising, prompting the state's efforts to enjoin him from further violations. The injunction only bars Maldonado from engaging in conduct that is itself illegal, a narrower limit than that upheld in *Madsen,* which involved a 36-foot no-protest buffer zone around an abortion clinic. *Madsen,* 512 U.S. at 769-70. Because the injunction bars only further violations of the same, constitutionally valid law that Maldonado previously violated, it "burdens no more speech than necessary to accomplish" the government's interest in curtailing billboard advertising. *See id.* at 754.

D. Equal Protection

The COAA exempts billboards that were already in place in 1967. Cal. Bus. & Prof. Code § 5364. Maldonado argues that this exception violates equal protection because it permits some speakers to

maintain billboards with offsite commercial advertising while barring him from doing so. Further, he claims that because speech is involved, the grandfathering clause is subject to strict scrutiny.

We have previously held that strict scrutiny under the Equal Protection Clause is inappropriate where a law regulating speech is content-neutral, even where the speech at issue was non-commercial. *Jones Intercable of San Diego, Inc. v. City of Chula Vista,* 80 F.3d 320, 327 (9th Cir. 1996) (citing *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 655 (1994)). The grandfathering clause of the COAA must survive, at most, an intermediate level of scrutiny. *See Jones Intercable,* 80 F.3d at 327.

The state's interest is substantial and easily passes the necessary scrutiny to overcome this equal protection challenge. The district court noted that banning new offsite billboards but allowing legal nonconforming billboards to remain "furthers the State's significant interest in reducing blight and increasing traffic safety," even if all billboards are not eliminated. The state government also has a strong financial interest in allowing the grandfathered billboards to stay. Without the exemption, the state would have to pay just compensation to the billboard owners or risk losing the state's full allotment of federal highway money. *See* 23 U.S.C. § 131. Maldonado's complaint against grandfathering also overlooks an important point – when he purchased the property in the early 1990s, the offsite ban had been in effect for more than twenty years. His sign

was never legally permitted or maintained, so he is not similarly situated to the grandfathered landowners. Maldonado's equal protection challenge to the grandfathering provision fails.[4]

Dismissed as moot with respect to Maldonado's challenges to the district court's injunction and affirmed as to the district court's grant of summary judgment on the remaining claims.

DISMISSED IN PART; AFFIRMED IN PART.

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[4] Except to the extent that it is subsumed in his equal protection argument, we decline to address Maldonado's passing references to "spot zoning." Arguments made in passing and inadequately briefed are waived. *Halicki Films, L.L.C. v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229-30 (9th Cir. 2008).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,
Plaintiff,
v.
WILL KEMPTON, in his capacity as Director of the California Department of Transportation,
Defendant.
/

No. C 02-03167 CRB
JUDGMENT
(Filed Mar. 1, 2007)

The Court having (1) dismissed certain of plaintiff's claims by Order dated November 27, 2002, and those claims having not been appealed; (2) dismissed plaintiff's challenge to the California Outdoor Advertising Act's restrictions on commercial speech by Order dated October 25, 2005; (3) granted plaintiff's motion for summary judgment by Memorandum and Order dated March 23, 2006; (4) granted defendant's motion for summary judgment by Memorandum and Orders dated July 13, 2006 and January 10, 2007; and (5) reviewed plaintiff's proposed judgment and defendant's approval of the judgment as to form, judgment is entered as follows:

1. Judgment is entered in favor of plaintiff and against defendant on plaintiff's claim that the California Outdoor Advertising Act is unconstitutional on its face with respect to non-commercial speech as set forth in the Court's Order dated March 23, 2006. The

California Department of Transportation is permanently enjoined from enforcing the COAA to prohibit non-commercial speech wherever COAA permits commercial speech and the Department must comply with the Court's order filed April 10, 2006.

2. Judgment is entered in favor of defendant and against plaintiff in accordance with the Court's orders of October 25, 2005, July 13, 2006, and January 10, 2007.

IT IS SO ORDERED.

Dated: March 1, 2007 /s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

2007 WL 108414 (N.D. Cal.)

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

WILL KEMPTON,

Defendant. /

No. C 02-03167 CRB

MEMORANDUM AND ORDER

(Filed Jan. 10, 2007)

Plaintiff alleges that California's Outdoor Advertising Act ("COAA") is unconstitutional on its face and as applied to a billboard he owns adjacent to Highway 101 in Redwood City, California. The Court has previously adjudicated nearly all the claims in this lawsuit. The only claim remaining is plaintiff's contention that the State has violated his equal protection rights by prohibiting off-premises commercial displays on his billboard while allowing other off-premises commercial displays along the same area of highway.

Now pending before the Court are the parties' further memoranda and evidence in support of their cross motions for summary judgment on the equal protection claim. As the parties are familiar with the background facts of their long-standing dispute as set

forth in the Court's several memoranda and orders, they will not be repeated here. After carefully considering the parties' papers and evidence, the Court GRANTS defendant's motion and DENIES plaintiff's cross motion.

UNDISPUTED FACTS

A. The State's Billboard Laws

California adopted its statutes prohibiting the placement of outdoor advertising displays adjacent to landscaped freeways in 1953. Declaration of Ronald W. Beals ("Beals Decl.") ¶ 3. The statutes originally provided that legally placed billboards existing at the time of the adoption of the statutes would be removed without compensation within three years after the freeway section was classified as landscaped. *Id.*

In 1965 Congress enacted the Highway Beautification Act, 23 U.S.C. section 131, which established national regulation for billboards along highways that receive federal aid. 23 U.S.C. § 131(a) (finding that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty"). The Highway Beautification Act imposes its standards upon the states by providing that any state that fails to comply with the Act shall lose ten percent of its federal highway funds. 23 U.S.C. § 131(b).

Among other things, the Act requires that "just compensation" be paid to the owner of any lawfully erected billboard if the state takes from the owner the right to erect and maintain signs, displays and devices on the billboard. 23 U.S.C. § 131(g). The federal share of such compensation is 75 percent. *Id.*

California amended COAA in 1967 to comply with the Highway Beautification Act, and, in particular, it amended COAA to provide for just compensation. Bus. & Prof. Code § 5288.3a (1967). Under the Highway Beautification Act, the State gained jurisdiction over all federal-aid highways in incorporated areas, such as Redwood City, which included thousands of off-premises displays that had been erected in accordance with local ordinances and had not required State permits. Beals Decl. ¶ 5. As a result, many of these displays became nonconforming, that is, they violated the State landscaped freeway provisions and other federal requirements. *Id.* These billboard shall be referred to as "legal, nonconforming." The State subsequently inspected all highways to determine which billboards were legal under the new law, legal nonconforming, or illegal. *Id.*

Congress subsequently amended the Highway Beautification Act to specify that states must pay compensation for the removal of all billboards, regardless of whether the removal is caused by nonconformance with federal law or more strict state standards. *Id.* ¶ 12; 23 U.S.C. § 131(g). California's billboard law complies with the federal act. Bus. & Prof. Code § 5412 ("no advertising display which was

lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited, whether or not the removal or limitation is pursuant to or because of this chapter or any other law, ordinance, or regulation of any governmental entity, without payment of compensation"). Congress has failed to appropriate any monies to pay its share of the required "just compensation" for more than 30 years. Beals Decl. ¶ 6. As a result, since 1974 or 1975, the State has decided not to commence discretionary removals or commence litigation to remove nonconforming displays if compensation has to be paid. *Id.* ¶ 9.

In sum, "since 1967, new outdoor advertising displays have been prohibited along classified landscaped freeways, but existing, legally erected billboards have been allowed to remain as "'nonconforming displays.'" *Id.* ¶ 15. The State continues to enforce the Act against illegal displays along landscaped freeways and to require their removal, such as with plaintiff Maldonado. Beal Decl. ¶ 15-16; Declaration of Christopher Lewis ("Lewis Decl.") ¶ 8.

B. Plaintiff's Billboard and the Surrounding Area

It is undisputed that plaintiff's billboard does not qualify as a "legal nonconforming" outdoor advertising display. The State never issued a permit for off-premises commercial displays on plaintiff's billboard prior to the State's adoption of regulations

prohibiting such displays, and the billboard never otherwise lawfully displayed off-premises commercial advertising. It is equally undisputed that all of the off-premises commercial billboards identified by plaintiff as evidence of the State's unequal treatment are either legal, that is, not adjacent to a landscaped portion of the freeway, or legal nonconforming, that is, these billboards lawfully displayed off-premises commercial advertisements prior to the State's adoption of laws making such displays illegal. Lewis Decl. ¶¶ 5-7. Finally, it is undisputed that if the State were to require these billboard owners to cease displaying off-premises commercial advertisements, the State would have to pay the owners just compensation or otherwise risk losing ten percent of the State's federal highway funds. *See People ex rel. Dep't of Transp. v. Desert Outdoor Advertising, Inc.*, 68 Cal.App.3d 440, 448-51 (1977).

DISCUSSION

Plaintiff argues that the State has violated the Equal Protection Clause by failing to remove legal nonconforming off-premises commercial displays along landscaped freeways while at the same time prohibiting plaintiff from placing off-premises commercial displays on his billboard.[1] In other words,

[1] It is worth noting that when plaintiff purchased his billboard, the restrictions on off-premises commercial displays were in effect; the right to such displays was not included in the "bundle of rights" plaintiff purchased with his billboard.

plaintiff objects to the perpetual "grandfathering" of the legal nonconforming off-premises commercial billboards. The ultimate question, then, is whether the Equal Protection Clause requires the State to remove all such billboards, including legal nonconforming billboards, or, in the alternative, requires the State to allow all off-premises commercial billboards, even those erected after the enactment of the laws prohibiting such billboards.

"The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws." *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*; *see also New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, [the Supreme Court's] decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest").

It is undisputed that the classification at issue here – differentiating between signs that were legal when erected and those that were never legal – is not based upon an inherently suspect characteristic. Plaintiff argues, however, that the classification jeopardizes the fundamental right of free speech; thus, the Court must apply strict scrutiny or at least the heightened review accorded commercial speech.

None of the cases cited by plaintiff involve the "grandfathering" of pre-existing legal commercial speech from new regulations prohibiting such speech; instead, all involve First Amendment challenges to content-based restrictions on speech. The ordinance at issue in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1982), for example, prohibited fighting words that insult or provoke violence on the basis of gender, race or religion, but not on any other basis, such as political affiliation or sexual preference. *Id.* at 391. Similarly, in *Greater New Orleans v. United States*, 527 U.S. 173 (1999), the regulation permitted broadcast advertisement of Indian casino or state-sponsored gambling, but not of gambling at legal, but privately-owned casinos. *Id.* at 190-91; *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 72 (1981) (ordinance prohibiting live entertainment but not other types of entertainment or commercial establishments).

Plaintiff's contention that the grandfathering provision is content based is unpersuasive. Whether a law is content based "turns on whether the [law] singles out certain speech for differential treatment

based on the ideas expressed." *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064, 1078 (9th Cir. 2006) (internal quotation marks and citation omitted). In *G.K. Ltd. Travel,* the Ninth Circuit held that an ordinance that exempted preexisting pole signs from its prohibition on such signs until such time as the pole sign is altered was not content based: "A grandfather provision requiring an officer to read a sign's message for no other purpose than to determine if the text or logo has changed, making the sign now subject to the City's regulations, is not content based." *Id.* at 1079. Here, State officials do not even have to read a sign's message to determine if the sign is subject to the State's prohibition on off-premises commercial advertising on landscaped freeways; instead, the official merely reviews State records to determine if the billboard had a permit for such displays prior to the law's enactment or was otherwise lawfully erected. As the grandfather provision is not content based, strict scrutiny is not required. *See Jones Intercable of San Diego, Inc. v. Chula Vista,* 80 F.3d 320, 325 (9th Cir. 1996).

The case most closely on point is *Outdoor Media Dimensions, Inc. v. Oregon,* 150 Or.App. 106, 945 P.2d 614 (1997). The grandfathering law at issue there granted outdoor advertising permits to those who owned billboards on or before a certain date, but not after. *Id.* at 624. The court held that rational review rather than strict scrutiny applied because the classification itself was content neutral. *Id.* at 625. The court concluded that the law's prohibition on the

installation of new billboards rationally furthered the state's interest in aesthetics and safety "because the legislature reasonably could have concluded that placing a cap on billboards would control visual blight and make traffic signs more visible. Allowing an exception for billboards already in existence . . . does not compromise the validity of those interests. . . . [T]he legislature could reasonably have concluded that the property interests of billboard owners justifies the disparate treatment." *Id.* (internal quotation marks and citations omitted); *see also Desert Outdoor Advertising,* 68 Cal.App.3d at 450 (applying rational review to an equal protection claim challenging COAA's compensation scheme).

The Ninth Circuit addressed an equal protection challenge in the commercial speech context in *Jones Intercable of San Diego, Inc.* The plaintiff cable operator sued the city for damages for rejecting its application to provide cable service to recently-annexed areas of the City. The district court dismissed the claim as barred by a federal law which precludes damages relief for a claim against a government entity arising from regulation of cable service. 80 F.3d at 323. On appeal, the plaintiff argued that the law precluding a damages remedy violated the Equal Protection Clause because it did not apply to other entertainment businesses or franchised utilities, such as water, gas and electricity. *Id.* at 327. The Ninth Circuit, after rejecting the plaintiff's argument that strict scrutiny applies, held that "[w]hether the applicable standard of equal protection review is one

of rational basis or some intermediate standard, there is ample justification for Congress's precluding damages only for the cable operators that it was subjecting to local government franchising power." *Id.*

Here, too, "whether the applicable standard of equal protection review is one of rational basis or some intermediate standard," *id.*, there is substantial justification for the State's decision not to remove those billboards for which it must pay compensation. First, the State's decision to pay compensation to owners of legal nonconforming billboards is substantially related to a significant government interest. If the State removes the signs but refuses to pay compensation, the State loses ten percent of its State highway funds. 23 U.S.C. § 131(b), (g). The State, of course, has a substantial interest in retaining those funds. *See Desert Outdoor Advertising,* 68 Cal.App.3d at 450. Second, the State's decision not to remove the legal nonconforming billboards and pay compensation is also substantially related to a significant government interest. As federal law requires the federal government to pay 75 percent of the just compensation, but the federal government continuously fails to allocate any funds for such payments, the State would have to pay all of the just compensation.

The State's policy to prohibit new off-premises commercial billboards, but allow legal nonconforming billboard displays to remain, is also justified; such a policy furthers the State's significant interest in

reducing blight and increasing traffic safety by reducing the number of billboards along state highways, even if it does not eliminate them entirely. *See Outdoor Media Dimensions, Inc.*, 150 P.2d at 625. As the Ninth Circuit has observed, if a sign ordinance "is designed to advance a valid [government] interest – reducing the number of dangerous, non-conforming signs – it should not matter that it is underinclusive." *Clear Channel Outdoor, Inc. v. Los Angeles*, 340 F.3d 810, 816 (9th Cir. 2003); *see also id.* at 815 ("An inspection program that targets only a subset of all signs is not necessarily inconsistent with the goals of safety an [sic] aesthetics for the same reasons that it is permissible to distinguish between on-site and off-site signs in the first place").

CONCLUSION

The State's decision not to remove legal, non-conforming off-premises commercial billboards along landscaped highways, but enforce COAA against illegal off-premises commercial billboards along the same highways, does not violate the Equal Protection Clause as a matter of law. As plaintiff offers no evidence that suggests that the State is selectively enforcing the law against his illegal billboard and indeed, the State's evidence establishes the contrary, plaintiff's motion for summary judgment on plaintiff's equal protection claim is DENIED and defendant's motion is GRANTED. As this is the last claim

remaining in this lawsuit, the Court will issue a judgment.

IT IS SO ORDERED.

/s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

Dated: January 10, 2007

2006 WL 1980393 (N.D.Cal.)

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

WILL KEMPTON,

Defendant.

/

No. C 02-03167 CRB

MEMORANDUM AND ORDER

(Filed Jul. 13, 2006)

In this section 1983 action plaintiff alleges that California's Outdoor Advertising Act ("the Act" or "COAA") violates the First Amendment on its face and as applied to a billboard he owns adjacent to Highway 101 in Redwood City, California. The Court has already issued several rulings in this case. The Court rejected plaintiff's challenge to the Act's ban on off-premises commercial advertising. October 25, 2005 Order. The Court also ruled that the Act is unconstitutional to the extent it prohibits non-commercial billboard displays where it permits on-premises commercial advertising. The Court therefore enjoined the defendant from enforcing the Act to prohibit non-commercial speech where the Act permits commercial speech. *Maldonado v. Kempton*, 422 F.Supp.2d 1169 (N.D. Cal. 2006).

Now pending before the Court are the parties' cross-motions for summary judgment on the remaining claims. As the parties are familiar with the background facts, the Court will not repeat them here.

DISCUSSION

Although the Court has previously ruled that the State may prohibit off-premises commercial speech at the same time it permits on-premises commercial speech, plaintiff still challenges the Act's prohibition on off-premises commercial speech on a variety of grounds: (1) it is unconstitutional because it permits an off-premises commercial billboard to be declared a public nuisance; (2) it is unconstitutional because the distinction between commercial and non-commercial speech is inherently vague; (3) the prohibition violates due process; (4) the prohibition violates something plaintiff refers to as "the suppression doctrine;" and (5) it violates the Equal Protection Clause as applied to him because the State permits some off-premises commercial displays along landscaped freeways. Plaintiff also seeks to have the Court declare that certain proposed signs are non-commercial and therefore not subject to COAA's prohibition on off-premises commercial advertising, and that the freeway adjacent to his billboard does not satisfy regulations defining a "landscaped" freeway.

I. Standing

Defendant maintains that plaintiff cannot prove that he has standing to challenge the Act's restrictions on commercial speech. To establish standing, plaintiff must prove: (1) that "there is actual or imminent injury, which is concrete and particularized, not hypothetical or conjectural," (2) that the injury is fairly traceable to the State's actions, and (3) "that it is likely, not merely speculative, that the injury will be redressed by a favorable decision." *Valley Outdoor, Inc. v. City of Riverside,* 446 F.3d 948, 953 (9th Cir. 2006). Defendant contends that plaintiff cannot satisfy the third element – redressability – because it is undisputed that Redwood City's sign ordinance applies to plaintiff's billboard and prohibits off-premises commercial advertising. *See* Declaration of Gerald Kelly ¶ 15, Exh. A, p. 10 (Redwood City ordinance § 3.114(a)). Moreover, to be entitled to a permit from CalTrans for off-premises commercial advertising, plaintiff would have to show written consent from Redwood City. Cal. Bus. & Prof. Code § 5354(a). Thus, argues defendant, even if the Court were to enjoin the State from applying the off-site commercial advertising ban to plaintiff's billboard, plaintiff would still not be able to engage in off-site commercial advertising.

As support for his argument, defendant relies on a Seventh Circuit case, *Harp Advertising Ill. v. Village of Chicago Ridge,* 9 F.3d 1290, 1291-93 (7th Cir. 1993). In *Harp,* the plaintiff advertising company sued the Village on the ground that a Village sign

ordinance and a zoning ordinance violated the First Amendment. The Seventh Circuit ruled that the plaintiff did not prove that it had standing because a different ordinance governing the size of billboards – and not challenged by the plaintiff – also prohibited the plaintiff's proposed billboard. The plaintiff therefore lacked "standing to challenge either the sign code or the zoning code, because it could not put up its sign even if it achieved total victory in this litigation." *Id.* at 1291 (citing *Renne v. Geary,* 111 S.Ct. 2331, 2337-38 (1991)).

> When the challenged statute is the only thing standing in the way of additional speech, the winner of the contest has a valuable prize, even if the government may enact a different statute that snatches away the victory. [The plaintiff] has no similar prospect of gain. An injunction against the portions of the sign and zoning codes that it has challenged would not let it erect the proposed sign; the village could block the sign simply by enforcing another, valid, ordinance already on the books. [The plaintiff] has no more to gain from winning this suit than would a firm seeking to erect a sign in Alaska (where an ordinance similar to [defendant's] spelled the difference), or a lawyer living in Chicago Ridge and interested not in erecting signs, but in constitutional injury.

Id. at 1292. Because winning the case would not redress the plaintiff's injury (being able to billboard

advertise), the plaintiff had not satisfied the redressability element of standing. *Id.; see also Get Outdoors II, Inc. v. San Diego,* 381 F.Supp.2d 1250, 1259-60 (S.D. Cal. 2005) (dismissing for lack of redressabilty); *Trinity Outdoor, L.L.C. v. Rockland, Maryland,* 2004 WL 78054 (D. Md. Jan. 15, 2004) (applying *Harp* and finding no standing because other non-challenged ordinances prohibited plaintiff's proposed advertising display).

The same reasoning appears to apply here. Even if plaintiff convinces the Court to enjoin the State from enforcing COAA's prohibition on off-site commercial advertising against plaintiff, Redwood City "could block the sign simply by enforcing another, valid, ordinance already on the books," *id.* at 1292; namely, its ordinance prohibiting off-premises commercial displays. Indeed, the undisputed evidence demonstrates that Redwood City has already enforced its ordinance against plaintiff by allowing him to keep his billboard on the condition that he use it only for on-premises commercial advertising or non-commercial messages.

Plaintiff's assertion that the Ninth Circuit and this Court have already decided standing in his favor on all the claims in his lawsuit is wrong. No court has ruled on his standing to pursue the claims in his amended complaint; no court has ruled on his standing on a motion for summary judgment rather than a motion to dismiss; and, in any event, no court has addressed plaintiff's standing in light of the Redwood City ordinance.

Plaintiff's attempt to distinguish *Harp* is also unpersuasive. That one of the two-challenged ordinances in *Harp* was repealed was not material to the court's standing decision; the dispositive issue was that the plaintiff did not challenge a different ordinance which prohibited the sign the plaintiff wished to erect. The same is true here: plaintiff does not challenge the Redwood City ordinance which prohibits any off-site non-commercial advertising.

A different distinction, not mentioned by plaintiff in his papers, is nonetheless important. In *Harp,* the grounds the plaintiff gave for challenging the sign and zoning ordinances did not apply to the uncontested ordinance. Here, in contrast, arguably some of plaintiff's challenges apply with equal force to the Redwood City ordinance – after all, both laws prohibit off-premises commercial advertising. For example, plaintiff's claim that the distinction between commercial and non-commercial speech is inherently vague applies to COAA and the Redwood City ordinance. If plaintiff were to prevail on his claim in this lawsuit, he might then be entitled to similar relief against Redwood City.

In addition, in some instances plaintiff may be seeking relief that is not precluded by the Redwood City ordinance. For example, plaintiff challenges Business and Professions Code section 5461 and its concomittant procedures for declaring a billboard that does not comply with COAA a public nuisance. While plaintiff's complaint and pleadings are far from clear, it may be that the Court could give plaintiff some

relief even if his commercial sign would nonetheless be barred by the Redwood City ordinance.

In any event, as the above discussion demonstrates, the Court must examine defendant's standing argument in the context of each of plaintiff's specific claims.

II. Plaintiff's Claims

A. Injunctions are unconstitutional

Plaintiff argues that COAA is unconstitutional because it permits courts to enjoin commercial billboards that violate the Act. California Business and Professions Code section 5461 provides, in relevant part, that all advertising displays that violate COAA "may be removed by any public employee as further provided in this chapter." While his argument is somewhat difficult to follow, he appears to contend that any injunctions issued pursuant to section 5461, including the October 7, 1999 state court injunction issued against plaintiff, are unconstitutional because they allow activity to be enjoined as a nuisance and they allow persons, such as plaintiff, to be punished for contempt. In other words, he argues that it is unconstitutional to enjoin the publication of commercial speech, even if such speech violates an otherwise lawful regulation. He therefore seeks an injunction enjoining "enforcement of Business and Professions Code section 5461 and all state court injunctions based thereon including the state court injunction

against Mr. Maldonado." Plaintiff's Motion for Summary Judgment at 9.

The Court will assume that plaintiff has standing to make this claim. The claim is, at bottom, an attack on the prohibition on off-site commercial billboards: if governmental entities cannot enjoin persons from violating such prohibitions, and cannot hold persons in contempt for violating the injunctions, the prohibition is meaningless. Thus, plaintiff's argument, if successful, would render the Redwood City ordinance unconstitutional as well.

Plaintiff's argument, however, is not successful. He relies solely on United States Supreme Court cases decided *before Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York,* 447 U.S. 557 (1980) and *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). In *Central Hudson,* the Supreme Court approved restrictions on commercial speech, provided such restrictions meet the test set out in the opinion. 477 U.S. at 566; *see also In re Doser,* 412 F.3d 1056, 1063 (9th Cir. 2005) ("Commercial speech is afforded less protection than other forms of protected expression"). The Ninth Circuit has interpreted *Metromedia* as standing for the proposition that a governmental entity can either ban all signs or ban all signs with the exception of on-premises signs to advance the government's interest in traffic safety and aesthetics. *See Outdoor Sys. Inc. v. Mesa,* 997 F.2d 604, 610-11 (9th Cir. 1993).

The Court understands that plaintiff disagrees with these cases and believes that if the Supreme Court were presented with the issue today it would rule differently. As this Court has previously noted, it is not for this Court "to overrule Supreme Court authority that is squarely on point." *Ackerley Comm. of the Northwest Inc. v. Krochalis,* 108 F.3d 1095, 1096 (9th Cir. 1997).

B. Commercial v. non-commercial is inherently vague

Next, plaintiff contends that COAA must be invalidated in its entirety because the commercial versus non-commercial distinction is inherently vague. As the Court previously ruled that the State could not constitutionally prohibit non-commercial speech where it permits on-premises commercial speech, plaintiff's argument is that the State must permit all speech, commercial and non-commercial alike, or prohibit all speech, regardless of content. For the reasons stated in the previous section, the Court will assume that plaintiff has standing to make this claim.

As plaintiff acknowledges, his contention is foreclosed by binding Ninth Circuit precedent. *See* Plaintiff's Motion for Summary Judgment at 14. In *Outdoor Systems, Inc.,* the court rejected the precise argument made by plaintiff here:

> Because our First Amendment jurisprudence recognizes a distinction between commercial

> and noncommercial speech, government officials have to place a particular message into one or the other category for purposes of regulation. The potential difficulty of that categorization in itself does not render the regulations unconstitutional. . . .
>
> We also disagree with the contention that the city officials' discretion is unfettered. On the contrary, the city officials can and must rely on judicial precedent to determine what is commercial speech. . . . [S]ufficient guidance in categorizing speech as commercial or noncommercial is provided by various decisions of the Supreme Court. If the Supreme Court's definitions of commercial and noncommercial speech do not constitute "narrow, objective, and definite standards," it is hard to imagine what would.

997 F.2d at 613; *see also Clear Channel Outdoor Inc. v. City of Los Angeles,* 340 F.3d 810, 816 (9th Cir. 2003) (rejecting challenge to commercial/noncommercial and on-premises/off-premises distinction in ordinance on the ground that the distinctions "have been sufficiently explicated in case law").

C. Substantive due process

Plaintiff also contends that the State's designation of the freeway adjacent to his billboard as "landscaped" violates substantive due process.

COAA defines a landscaped freeway as "a section or sections of a freeway that is now, or hereafter may

be, improved by the planting at least on one side or on the median of the freeway right-of-way of lawns, trees, shrubs, flowers or other ornamental vegetation requiring reasonable maintenance." Cal. Bus. & Prof. Code § 5216(a). The California Code of Regulations includes detailed regulations governing the designation of an area of freeway as "landscaped." 4 Ca CCR § 2500 et seq. The regulations give the "Chief Landscape Architect," or whoever is so delegated, the authority to classify a freeway as landscaped, *id.* § 2504, and include details such as the timing and deadlines for designation and the requirements for such designation. *See, e.g.,* §§ 2505, 2506, 2507. A freeway is classified as "landscaped" only when the landscaping is complete and a licensed Landscape Architect from the Department of Transportation upon personal inspection certifies in writing that the freeway is landscaped. *Id.* at § 2506(a), 2508(a). A person may petition the Department of Transportation to declassify a landscaped freeway, and the Department must make a determination within 90 days of receiving the petition. *Id.* at § 2512.

Plaintiff first makes what he characterizes as a "facial" challenge to the landscape classification of the freeway at issue on the ground that it is arbitrary and capricious to classify the freeway as such in light of the regulations defining Redwood City as "urban." *See* Cal. Bus. & Prof. Code § 5408. He also argues that the classification violates substantive due process "as applied" based on the particular characteristics of

the freeway adjacent to his billboard. Plaintiff's challenge fails for several reasons.

First, plaintiff has failed to show that he has standing to make this claim as the Court discussed at the beginning of its Memorandum and Order. Even if he were to succeed, the Redwood City ordinance would still preclude him from placing any off-premises commercial display on his billboard; thus, his success would not grant him any relief. Although plaintiff has been given numerous opportunities to do so, he has not articulated any challenge to the Redwood City ordinance other than those the Court has inferred, discussed, and rejected earlier in this Memorandum and Order. As the Redwood City ordinance remains unchallenged, the Court must assume that plaintiff at this time lacks standing to challenge the designation of the freeway adjacent to his billboard as landscaped. *See Harp Advertising Ill.*, 9 F.3d at 1292.

Second, even assuming he has standing, the Act's definition of "urban" does not mean that it violates substantive due process (or what plaintiff refers to as the "suppression doctrine) to also characterize such an area as landscaped. Plaintiff cites no case that suggests that the myriad cases holding that a governmental entity may prohibit off-premises commercial signs in the name of traffic safety or aesthetics somehow do not apply to urban areas. Plaintiff's reliance on *City of Laude v. Gilleo*, 512 U.S. 43, 49-54 (1994) is unavailing. *Laude* involved an ordinance prohibiting *nearly all signs*, including non-commercial signs, in residential areas. *Id.* at 55 (stating that the ordinance

is unconstitutional because it forecloses a certain medium of expression "to political, religious, or personal messages").

Third, assuming plaintiff is correct that the area adjacent to his billboard is no longer landscaped and does not meet the requirements for being classified as such, Department of Transportation regulations provide him with a mechanism to request the declassification of the freeway. 4 Ca CCR § 2512. There is no evidence that plaintiff has ever made any such request and plaintiff has not proffered any reason why he should not first be required to avail himself of this mechanism before this Court reaches out and decides an issue of state law; namely, whether the freeway satisfies the State's definition of "landscaped."

D. Equal protection

Plaintiff also contends the State has violated his equal protection rights because it permits other off-premises commercial billboard displays along the area of "landscaped" freeways adjacent to his freeway.

When COAA was enacted, the legislature decided that billboard displays that were lawful at the time COAA was passed would not violate COAA even if the billboards' current use violated the newly enacted law. Cal. Bus. & Prof. Code § 5216.1. The legislature determined that such "lawfully erected" displays could not be removed, or its "customary maintenance or use be limited," without paying just compensation

to the owner. *Id.* § 5412. The State contends that the off-premises commercial displays identified by plaintiff all fall within this exception to the Act; these billboards all displayed off-premises commercial advertisements at the time the freeway was designated as "landscaped." According to defendant, the State has never budgeted any monies to condemn these billboards; thus, it permits these off-premises commercial displays while prohibiting any new off-site commercial displays along the same area of freeway.

Plaintiff does not dispute the State's assertion. Nor does he contend that his billboard qualifies for similar treatment; he does not dispute the State's evidence that the State has never issued a permit for off-premises commercial advertising on his billboard. Plaintiff purchased the billboard in 1993, after off-premises commercial advertising had already been banned along the freeway.

Plaintiff nonetheless contends that the State's grandfathering of the previously lawful off-premises commercial advertising displays violates equal protection. "The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a

fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*; *see also New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, [the Supreme Court's] decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest").

The first question, then, is what standard of review to apply to the State's decision to allow the "lawfully erected" off-premises commercial billboards to remain while at the same time prohibiting new off-premises commercial displays, such as those proposed by plaintiff. The distinction between new and old billboards is not drawn upon an inherently suspect distinction; rather, plaintiff argues that heightened scrutiny rather than rational review applies because COAA implicates a fundamental right, namely, freedom of speech. Defendant does not address the standard of review issue. The Court notes, however, that whatever the standard, it cannot be more scrutinizing than that normally accorded commercial speech regulations. As one court has noted, "[b]ecause regulation of commercial speech is subject to intermediate scrutiny in a First Amendment challenge, it follows that equal protection claims involving commercial speech also are subject to the same level of

review." *Capobianco v. Summers*, 377 F.3d 559, 564 (6th Cir. 2004) (internal quotation marks and citation omitted).

The Court need not decide the standard of review, however, because it concludes that the record is inadequate to finally resolve plaintiff's equal protection claim. Although the State claims that it has not condemned the legal but non-conforming billboards because it does not want to pay compensation for the billboard, there is no evidence that such a decision has actually been made. The statement from a Senior Highway Outdoor Advertising Inspector that he "understand[s] that no monies have ever been budgeted" for the purpose of condemning non-conforming signs, Declaration of Sergay Ivazian at ¶ 10, is not evidence of a rational decision: it is merely evidence of inaction. Moreover, while COAA plainly requires compensation to certain billboard owners, there is no evidence in the record as to why the legislature requires compensation. *See, e.g., Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 879 (1980) (stating that section 5412 sought to "require payment of compensation when such [compensation] was necessary to protect California's receipt of federal highway funds), rev'd on other grounds, 453 U.S. 490 (1981). Before the Court can declare that the State's decision to allow certain non-conforming billboards while prohibiting plaintiff's is rational (or is narrowly tailored to satisfy a substantial government interest) because the State does not want to pay to condemn the pre-existing displays, the Court must

know the basis for the State's assertion that it must pay to condemn, other than that the State says it must.

Moreover, the evidence suggests that the State has continued to renew permits for off-premises commercial displays along landscaped freeways. When plaintiff raised this issue in his opposition brief, the State responded by asserting that there was no evidence of renewal, even though such renewal was obvious in light of the period of the permits and the date the area of freeway at issue was designated as "landscaped." The State also asserted that even if such permits had been renewed, they had been renewed by mistake. At oral argument the State took yet another position: it contended that the permits are renewed automatically. Finally, after oral argument, the State wrote a letter to the Court advising that the permits are indeed renewed automatically because to not do so would require the payment of compensation. The State's letter, of course, is not evidence; nor does it explain the basis for the legislature's decision to pay compensation to billboard owners with non-conforming billboards whose permits have expired.

While the State has not met its burden, neither has plaintiff. *See C.A.R. Transp. Brokerage Co., v. Darden,* 213 F.3d 474, 480 (9th Cir. 2000) (stating when that when the plaintiff moves for summary judgment he has the burden of producing evidence that would entitle him to a directed verdict). He has not shown that the legislature would not have to pay

compensation; nor has he cited any law that suggests that the State's decision not to condemn in order to avoid the paying of compensation (assuming such a decision has been made) is irrational or otherwise violates the Constitution. Nor has plaintiff addressed redressability; there is nothing in the record from which the Court can conclude that the Redwood City ordinance similarly violates plaintiff's equal protection rights. In any event, the Court will not make a decision on an important issue of constitutional law on an inadequate record.

Accordingly, the parties' motions for summary judgment on plaintiff's equal protection claim are continued to give the parties the opportunity to complete the record and more fully explore the issues.

E. Temporary political sign ordinance

COAA prohibits all "advertising structures" along landscaped freeways, except for, among other things, on-premises commercial displays. Cal. Bus. & Prof. Code §§ 5440, 5442.5 This Court, however, has ruled that the State cannot favor commercial over non-commercial speech and therefore enjoined the State from prohibiting non-commercial speech where the Act prohibits commercial speech.

As a result, plaintiff's challenge to the temporary political sign section, Business and Professions Code section 5405.3, makes no sense. Plaintiff asserts that he wants to place non-commercial signs, such as "CalTrans Sucks," on his property, but not on his

billboard, and suggests that he can do so only if the signs satisfy the temporary political sign requirements. Since COAA does not apply to on-premises commercial advertising, *see Cal. Dep't of Transp. v. Maldonado,* 86 Cal.App.4th 1225, 1233-34 (2001), and since the State must allow non-commercial signs whereever [sic] such on-premises commercial signs are allowed, there is nothing in COAA or in the record that prohibits him from doing so in light of the Court's injunction.

This omission highlights another problem with plaintiff's claim: ripeness. Plaintiff has not displayed an obviously non-commercial sign on his property since the Court issued its injunction. There is nothing in the record, or the state court injunction, that suggests the State would prohibit him from displaying such a sign. Accordingly, plaintiff's challenge to the "temporary political sign" statute is dismissed.

F. Judicial declaration

In his motion for summary judgment plaintiff asks this Court to judicially declare whether certain proposed signs identified in paragraphs 20 through 23 of his Amended Complaint run afoul of COAA; in other words, he asks this Court, in the first instance, to decide whether certain conduct would run afoul of state law (and, by extension, the Redwood City ordinance) and therefore violate the state court injunction or this Court's order enjoining the State from applying COAA to non-commercial speech. Defendant

cross-moves for summary judgment, identifying which of the proposed signs, or portions of the proposed signs, are, in its opinion, in compliance with COAA.

Plaintiff alleges that in 2004 he was contacted by a group that proposed to place on plaintiff's billboard displays saying, among other things, "Got Faith," and "The Family That Prays Together Stays Together." Amended Complaint ¶ 20. He then alleges that he wanted to publish the messages with the names and addresses of local churches in Redwood City. *Id.* He further alleges that he "has wanted" to publish a message about contributing funds to the local Rotary Club, *id.* ¶ 21, and a message, paid for out of his own pocket, supporting the San Francisco Giants. *Id.* ¶ 22. Yet another proposed sign would advertise his cousin's Mexican restaurant. *Id.* ¶ 23.

The parties' request for a declaratory judgment is denied. First, the Amended Complaint does not include a Declaratory Judgment Act claim seeking a declaration as to whether certain proposed signs would violate COAA.

Second, even if the Amended Complaint included such a claim, plaintiff has not shown that the claim is ripe for adjudication. "Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Commission,* 220 F.3d 1134, 1136 (9th Cir. 2000) (internal quotation marks and citations omitted). The Court's "role is

neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Id.*

The ripeness inquiry on a claim for declaratory relief is whether "there is substantial controversy, between parties having legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal Oil, Co.*, 312 U.S. 270. 273 (1941). The Court must find that "there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract." *Thomas,* 220 F.3d at 1139 (internal quotation marks and citation omitted).

Plaintiff has not shown that there is a definite and concrete dispute because there is no evidence that suggests he intends to actually display the signs set forth in paragraphs 20 through 23 of his Amended Complaint. He alleges, for example, that "Family Theater Productions" approached him in October 2004 about displaying signs publishing messages such as "Got Faith." Amended Complaint ¶ 20. There is no evidence that such group is still interested in publishing such messages today. Plaintiff similarly claims that he would like to place a display advertising the Rotary Club, paid for by Rotary Club members one month and paid by himself one month. *Id.* ¶ 21. There is no evidence that plaintiff has ever been in contact with the Rotary Club about such a

sign; indeed, the complaint reads as though plaintiff and his counsel sat down and thought up various proposed signs to address as many different issues as possible.

At oral argument plaintiff's counsel represented that his client had once displayed a "Giants" sign on his billboard. There is no evidence in the record of this display and what it said; more importantly, counsel did not represent that the State had threatened to remove the sign or otherwise indicate at the time that it believed the sign violated COAA.

The Ninth Circuit's holding in *Maldonado I* is not to the contrary. *Maldonado* was decided before plaintiff filed his Amended Complaint and, more importantly, the claim the court reviewed involved a sign which plaintiff *was actually displaying on his billboard. Maldonado v. Harris,* 370 F.3d 945, 953 (9th Cir. 2004) (discussing ripeness in the context of plaintiff's challenge to the application of COAA to his current advertisements).

Finally, the parties' motions must be denied for a third reason: neither party provides the Court with any meaningful analysis. For example, plaintiff contends that the proposed sign advertising a Mexican Restaurant is non-commercial, but he offers the Court no analysis, or case citation, to support that remarkable and unadorned assertion. The State similarly baldly asserts that a sign identifying the name and address of a church is an off-premises commercial display, again without any analysis. This lack of

analysis is especially troubling given that earlier in this litigation the State wrongly contended that a paid political advertisement qualifies as off-premises commercial advertising.

For all the above reasons, the parties' request that the Court label certain hypothetical signs as commercial or non-commercial, like an umpire calling balls and strikes, is denied.

CONCLUSION

Plaintiff's attempt to invalidate the State's ban on off-premises commercial advertising along landscaped freeways fails. Most of plaintiff's arguments fail based on binding precedent; namely, the opinions of the Ninth Circuit and the United States Supreme Court. Accordingly, defendant's motion for summary judgment on plaintiff's claims, other than his equal protection claim, is GRANTED, and plaintiff's cross-motion for summary judgment on those claims is DENIED.

The parties' cross-motions for summary judgment on plaintiff's equal protection claim is continued to allow the parties to augment the record and more completely brief the issues. Each party may submit a further memorandum with supporting evidence, not to exceed 10 pages, on or before September 8, 2006. Any replies shall be filed on or before September 22, 2006. The Court will take the matter under submission at that time. The Court has given the parties nearly two months with the expectation that they will

use the time to fully explore the facts and law surrounding this issue.

IT IS SO ORDERED.

/s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

Dated: July 13, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

WILL KEMPTON, in his capacity as Director of the California Department of Transportation,

Defendant.
/

No. C 02-03167 CRB

ORDER

(Filed Apr. 10, 2006)

The Court granted plaintiffs' motion for summary judgment and enjoined defendant from enforcing the California Outdoor Advertising Act ("COAA") to prohibit non-commercial speech where the Act permits commercial speech. The Court also expressed its concern that unless and until the State amends COAA to comply with the First Amendment, the Act will continue to have a chilling effect on the exercise of the constitutional right to free speech. The Court therefore directed the parties to propose methods for addressing this concern.

In its Joint Case Management Conference Statement dated April 3, 2006, the State agreed to perform the following:

1. *Notice to Permit Holders*: Send a letter to all persons or companies holding outdoor advertising permits in California explaining

that noncommercial copy can be placed on any legal outdoor advertising display.

2. *Notice to Private Associations*: Send a copy of that letter to organizations that deal with sign owners that do not have Caltrans permits and ask them to notify their members/ sign owners: League of California Cities, County Supervisors Association, California State Outdoor Advertising Association, California Electric Sign Association, California State Outdoor Advertising Association, California Electric Sign Association, and the State Chamber of Commerce.

3. *Web-Site Publication*: Post notice of the decision o[n] the Outdoor Advertising section of Caltrans Web Page (and, if possible, include a link to the Court's opinion).

4. *Regulatory Amendment*: Amend the existing state regulations: probably by adopting a new regulation to the effect that: "Nothing in the Outdoor Advertising Act nor these regulations prohibits any person from placing any noncommercial copy on any legal outdoor advertising display."

5. *Notice to Mr. Maldonado*: In the event that the Department seeks in the future to enforce the State court injunction against Mr. Maldonado for contempt that the Department shall attach a copy of this Court's decision to any subsequent order to show cause.

6. *Statutory Amendment*: The Department will seek to find a Legislative sponsor to carry a bill whose language satisfies the Court's order respecting noncommercial displays.

April 3, 2006 Joint Case Management Conference Statement at 4.

The State's proposal addresses the Court's concerns. Accordingly, the State shall submit a declaration within 30 days of the date of this Order updating the Court on the status of its compliance with the above proposal.

IT IS SO ORDERED.

Dated: April 11, 2006

/s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

CIVIL MINUTES

(Filed Apr. 6, 2006)

Judge CHARLES R. BREYER

Date: **April 6, 2006**

C-02-03167CRB

MALDONADO v. KEMPTON

Attorneys: Chris Kuebler (telephone) John Scott

Deputy Clerk: **BARBARA ESPINOZA** Reporter: **Debra Pas**

	PROCEEDINGS:	**RULING:**
1.	Case Management Conference – Held	
2.		
3.		

ORDERED AFTER HEARING:

Cross Motions for Summary Judgement to be filed by 5/05/2006, counsel to rewrite motions and any declarations must be re filed/attached to new motion. Counsel to refrain in accordance with what has already been decided

( ) ORDER TO BE PREPARED BY:
Pltf ___ Deft ___ Court ___

( ) Referred to Magistrate Judge For: _____
( ) By Court ( ) Parties to approach Chief Magistrate in future

(X) CASE CONTINUED TO June 16, 2006 @ 10:00 a.m. for Cross Motions for Summary Judgment

Discovery Cut-Off ____ Expert Discovery Cut-Off ____

Pltf to Name Experts by __ Deft to Name Experts by __

P/T Conference Date ____ Trial Date___ Set for __ days
Type of Trial: ( ) Jury ( ) Court

Notes: _____
_____
_____
_____

422 F.Supp.2d 1169

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

WILL KEMPTON, in his capacity as Director of the California Department of Transportation,

Defendant.
/

No. C 02-03167 CRB

MEMORANDUM AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

(Filed Mar. 23, 2006)

In this section 1983 action plaintiff alleges that California's Outdoor Advertising Act ("the Act" or "COAA") violates the First Amendment on its face. Now pending before the Court are the parties' cross-motions for summary judgment. Having reviewed the memoranda submitted by the parties, and having had the benefit of oral argument, the Court DENIES defendant's motion for summary judgment to the extent defendant moves for summary judgment on plaintiff's facial challenge. The Court GRANTS plaintiff's motion for summary judgment to the extent plaintiff challenges the constitutionality of the Act on the ground that it impermissibly favors commercial over non-commercial speech in violation of the First Amendment.

BACKGROUND

I. Undisputed Facts

This case arises from a long-running dispute between plaintiff and the California Department of Transportation ("Caltrans") regarding the use of plaintiff's billboard. Plaintiff owns a commercial building located at 3600 Rolison Road adjacent to the southbound lanes of Highway 101 in Redwood City. In the mid-1950's a double-sided billboard was mounted on the roof of plaintiff's building.

COAA regulates billboards that are visible from and are placed near interstate and primary highways in California. *See* Cal. Bus. & Prof. Code § 5271. COAA section 5200 et seq., prohibits all billboard advertising along a "landscaped freeway" unless the billboards advertise goods or services available at the property on which the billboard is placed ("on-premises" advertising). Caltrans is responsible for enforcing COAA. In October 1993, Caltrans cited plaintiff for violating COAA. Plaintiff was cited again in 1996. Plaintiff subsequently sought review by the California Outdoor Advertising Review Board. Plaintiff argued that his billboards (for Stanford Shopping Center, a Holiday Inn, and Skyway Cellular, among other businesses) were lawful on-premises advertising because the businesses advertised also leased space on the premises. The Board disagreed. Plaintiff still did not remove the offending advertisements and Caltrans filed suit in state court to abate a public nuisance, namely, the advertisements. Following a

trial, the Superior Court entered an injunction enjoining plaintiff from displaying any advertising on his billboard without permission from Caltrans and generally enjoined plaintiff from displaying any on-premises advertising unless it was for business conducted on the premises.

Plaintiff subsequently placed a sign on his billboard reading "AVAILABLE FOR ON SITE USE 650-366-2979." The trial court found plaintiff in contempt. Plaintiff did not give up. Shortly thereafter he put up a sign saying "IN GOD WE TRUST" "WE PRAY FOR WORLD PEACE" "HELP STOP TERRORISM" and listing the phone numbers of the FBI and Red Cross among others. He also included "AVAILABLE FOR ON SITE USE 650-366-2979." The other side of the billboard advertised Habitat for Humanity. The State again instituted contempt proceedings. In February 2003, while this action was pending, the state court found that the Habitat for Humanity billboard and the "AVAILABLE FOR ON SITE USE" signs violated the permanent injunction and ordered plaintiff to pay a fine and the State's fees and costs. The court also determined that the "In God We Trust" display did not violate the injunction or the previous contempt orders.

II. Procedural History

In his initial complaint plaintiff challenged the constitutionality of several portions of the Act on its face and as applied to him. This Court dismissed the

complaint on grounds of standing, claim preclusion, and the Rooker-Feldman doctrine. Plaintiff appealed some of the Court's rulings and the Ninth Circuit reversed and remanded the action to this Court for decision on the merits.

Plaintiff subsequently filed a First Amended Complaint. Plaintiff continues to challenge the constitutionality of COAA on its face and as applied. Among other things, plaintiff alleges that the Act chills publication of non-commercial speech and that past enforcement of the injunction against plaintiff has caused him to refrain from using his billboard to publish paid political advertisements and free religious messages.

For example, he alleges that during the 2004 election season he was interested in selling billboard space to political candidates looking to publish political campaign messages. He was approached by a candidate for the California Assembly. The candidate's campaign offered to pay for use of plaintiff's billboard for political campaign messages on the condition that plaintiff guarantee that such advertising is legal. Plaintiff asked defendant to provide a written statement declaring that political advertising was permissible on the billboard. Defendant declined, stating that he could not give an opinion without first reviewing the copy to be published on the billboard. As a result, plaintiff refrained from publishing the campaign messages.

Plaintiff also alleges that the Act chilled and continues to chill him from displaying free religious messages during the holidays. Plaintiff was approached by a local theater group and asked to display messages such as "A WORLD AT PRAYER IS A WORLD AT PEACE," and "GOT FAITH?" Plaintiff wanted to include the names and addresses of local churches with the above display. He refrained from publishing this display for fear of violating the Act.

The Court previously ruled that the Act's distinction between "off-premises" and "on-premises" advertising is legal. The sole issue now before the Court is whether COAA prohibits non-commercial speech where it permits commercial speech, and if so, whether this prohibition renders the Act unconstitutional.

STANDARD OF REVIEW

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A principal

purpose of the summary judgment procedure "is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986).

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. If the moving party satisfies its initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. 574, 586; *see also Anderson,* 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient"). Rather, the nonmoving party must go "beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial." *Celotex,* 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)) (internal quotations marks omitted).

DISCUSSION

The question before the Court is whether COAA favors commercial over non-commercial speech in violation of the First Amendment.

I. Billboard Statutes Must Allow Non-Commercial Signs if They Allow On-Premises Commercial Signs

The leading case regarding First Amendment challenges to billboard ordinances is *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). Under *Metromedia,* "an ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards or regulates noncommercial billboards based on their content." *National Advertising Co. v. City of Orange,* 861 F.2d 246, 248 (9th Cir. 1988) (*citing Metromedia,* 453 U.S. at 513, 516). The San Diego ordinance at issue in *Metromedia* had an exception to its general ban on billboard advertising for on-premises commercial advertising; there was no similar exception for non-commercial advertising. The Supreme Court held the ordinance unconstitutional:

> [t]he fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others. . . . [i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than

> the communication of non-commercial messages.

Metromedia, 453 U.S. at 513; *see also Clear Channel Outdoor Inc. v. City of Los Angeles,* 340 F.3d 810, 814-15 (9th Cir. 2003) (following *Metromedia); Ackerley Communications of Northwest v. Krochalis,* 108 F.3d 1095, 1099 (9th Cir. 1997) (same); *Outdoor Sys., Inc. v. City of Mesa,* 997 F.2d 604, 610 (9th Cir. 1993) (same); *National Advertising Co.,* 861 F.2d at 248 (same). The law is settled that billboard ordinances may not favor commercial speech by permitting on-premises commercial speech while prohibiting all non-commercial speech. Therefore, the primary issue here is whether COAA prohibits non-commercial speech where it permits on-premises commercial speech.

II. COAA Prohibits Non-Commercial Speech

Defendant contends that the Act is constitutional because it *does not* prohibit a property owner from placing a non-commercial billboard along a landscaped freeway. To support this interpretation of the Act defendant relies on the declaration of the Senior Outdoor Advertising Inspector at the California Department of Transportation. *See* Decl. of Sergay Ivazian. Mr. Ivazian asserts that the Department has always interpreted non-commercial displays as outside the scope and intent of the Act. Ivazian Decl. at ¶¶ 1-12. The State's interpretation of the Act is belied by (1) the Ninth Circuit's ruling in this case,

(2) the language and structure of COAA, and (3) the State's inconsistent interpretations of COAA.

A. The Ninth Circuit Has Held That COAA Prohibits All Non-Commercial Speech

The Ninth Circuit squarely rejected defendant's unsupported interpretation of COAA:

> Counsel for Caltrans asserted at oral argument that COAA does not apply to non-commercial advertisements, although he could point to nothing in the statute in support of that assertion. . . . [N]othing in the statute creates an exception for non-commercial advertisements and no controlling caselaw has construed the Act in the manner Caltrans suggests.

Maldonado v. Harris, 370 F.3d 945, 953 n.5 (9th Cir. 2004). Defendant merely dismisses the Ninth Circuit's statement as dicta. The Court disagrees. The statement was critical to the Ninth Circuit's conclusion that plaintiff had standing. If COAA does not apply to non-commercial speech, plaintiff's argument that his then-current conduct violated COAA would have failed and he would not have had standing. Thus, the Ninth Circuit's statement was necessary to its holding and therefore the law of the case, and indeed, of the circuit. *See Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1186 (9th Cir. 2003) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that

ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense") (internal quotation marks and citation omitted).

B. The Language and Structure of the Statute

Even assuming the Ninth Circuit had not yet ruled on the issue, the language and structure of the statute demonstrate that COAA applies to non-commercial speech. The Act prohibits all billboard "advertising displays" adjacent to landscaped freeways. *See* Cal. Bus. & Prof. Code § 5440 ("Except as otherwise provided in this article, no *advertising display* may be placed or maintained on property adjacent to a section of a freeway that has been landscaped if the *advertising display* is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway") (emphasis added).

"'Advertising display' refers to advertising structures and to signs." Cal. Bus. & Prof. Code § 5202. "Advertising structure" is defined as "a structure of any kind or character erected, used or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed, including statuary, for advertising purposes." Cal. Bus. & Prof. Code § 5203. The Act then identifies specific examples of what is *not* an "advertising

structure," but does not further define "advertising structure." Cal. Bus. & Prof. Code § 5203 ("An advertising structure does not include: (a) Official notices issued by any court or public body or officer; (b) Notices posted by any public officer in performance of a public duty or by any person in giving legal notice; (c) Directional, warning or information structures required by or authorized by law or by federal, state or county authority; (d) A structure erected near a city or county boundary, which contains the name of such city or county and the names of, or any other information regarding, civic, fraternal or religious organizations located therein").

The prohibition of all "advertising displays" does have an exception for "on-premises" advertising. *See* Cal. Bus. & Prof. Code § 5442 ("Section 5440 does not apply to any advertising structure or sign if the advertising display is used exclusively for any of the following purposes: (a) [t]o advertise the sale or lease of the property upon which the advertising display is placed; (b) [t]o designate the name of the owner or occupant of the premises upon which the advertising display is placed, or to identify the premises; (c) [t]o advertise goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed").

The paid political advertisements plaintiff alleges he was "chilled" from placing on his billboard fall within the definition of "advertising displays" prohibited by the Act and fall outside the exception

for on-premises advertising. *See* Cal. Bus. & Prof. Code § 5442. The Supreme Court has made it clear that paid political advertisements do not lose their full First Amendment protection simply because they were paid for. *See N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold"). Therefore, the plain language of the Act prohibits non-commercial speech while allowing on-premises commercial advertisements.

The conclusion that COAA impermissibly prohibits non-commercial speech is supported by a provision in COAA exempting temporary political signs. *See* Cal. Bus. & Prof. Code § 5405.3. ("A temporary political sign is a sign which: (a) Encourages a particular vote in a scheduled election; (b) Is placed not sooner than 90 days prior to the scheduled election and is removed within 10 days after that election; (c) Is no larger than 32 square feet; and (d) Has had a statement of responsibility filed with the State Department of Transportation certifying a person who will be responsible for removing the sign and who will reimburse the department for any cost to remove it"). If, as defendant claims, COAA does not apply to non-commercial speech, there would be no need for an exception from the billboard ban for temporary political signs – all political signs are non-commercial. Furthermore, the exemption was added to the Act in 1979 to clear up confusion as to whether

the Act covered temporary political signs. 79 Ops. Cal. Atty. Gen. 117 (1996) (*citing* Stats. 1979, ch. 1054, § 2 (Cal. 1979)). By adding the explicit exemption, the legislature made it clear that COAA does apply to political signs.

The Act's exemptions for directional signs, official notices, and city or county signs similarly demonstrate that the Act prohibits non-commercial signs. *See* Cal. Bus. & Prof. Code § 5442.5. "Section 5440.1 does not apply to any advertising display . . . used exclusively for any of the following purposes: (a) Directional and official signs and notices, including, but not be limited to, signs and notices pertaining to natural wonders or scenic and historical attractions that are otherwise required or authorized by law and conform to regulations adopted by the department." Again, these exemptions would be unnecessary, if, as defendant claims, the Act does not apply to non-commercial speech. Directional signs – by any stretch of the imagination – cannot be considered commercial speech.

Moreover, the majority of billboard ordinances that courts have held to be neutral towards non-commercial speech have contained what is referred to as a "substitution clause." A substitution clause is an express statement that exempts non-commercial speech from a billboard regulation or allows for non-commercial messages to be substituted for permitted commercial messages. *See Clear Channel*, 340 F.3d at 814-15 (holding ordinances constitutional because they include a "substitution clause" that "guarantees

that political or other noncommercial messages" are not restricted to on-premises signs); *Valley Outdoor, Inc. v. County of Riverside,* 337 F.3d 1111, 1113 (9th Cir. 2003) (discussing amendment to Riverside ordinance that allows any non-commercial message to be substituted for a commercial message on any otherwise lawful sign); *Outdoor Systems,* 997 F.2d at 612 (discussing ordinances that were content neutral with respect to non-commercial speech because the ordinances contained a substitution clause that permitted any otherwise properly erected sign to contain non-commercial messages in lieu of any other message). COAA's lack of a similar exemption for non-commercial speech is additional evidence that the Act prohibits non-commercial speech where it permits commercial speech.

C. The State's Positions

Defendant's assertion that the State has never treated COAA as applying to non-commercial speech is contradicted by the California Fair Political Practices Commission's ("FPPC") interpretation of the Act. Plaintiff's counsel contacted the FPPC to obtain an opinion regarding campaign finance law as applied to proposed political advertisements on plaintiff's billboard. *See* Decl. Attorney Zell Re Motions For Summary Judgment, Ex. E. The FPPC responded with an informal assistance letter which states, "it appears that the sweep of the injunction extends to *all* 'off-premises' advertisements, including those you characterize as 'noncommercial' political advertising."

Id. (original emphasis). Thus, at least one state agency reads the Act as does plaintiff, the Ninth Circuit, and this Court.

Defendant himself filed a contempt motion in state court seeking to force plaintiff to remove his non-commercial "In God We Trust/Help Stop Terrorism" sign as violative of the state court injunction. *See* Exh. C to Plaintiff's Request for Judicial Notice. This sign unquestionably contained non-commercial speech. Defendant claims that Caltrans only sought the contempt order for the portion of the billboard display that listed the phone numbers of the off-premises organizations the Red Cross, FBI, and the San Mateo Sherriff [sic], and not for the billboard's "In God We Trust/Help Stop Terrorism" message. *See* Decl. of Daniel Weingarten in Support of Defendant's Reply, Ex. A. Whether the contempt motion targeted non-commercial speech is in dispute; nonetheless, the confusion surrounding the issue bolsters plaintiff's claim that he feels "chilled" from displaying non-commercial messages on his billboard.

The law cited by defendant does not support his interpretation of the Act. There is no California caselaw that specifically addresses whether COAA applies to non-commercial advertisements. The 1996 opinion of the California Attorney General was issued in response to the following question submitted by a member of the California State Assembly: "Does the Outdoor Advertising Act (Bus. & Prof. Code, §§ 5200-5486) apply to the posting of a sign on private

property adjacent to a highway that expresses the property owner's opinion concerning a state or federal public official?" 79 Ops. Cal. Atty. Gen. 117 at 1 (1996). The Attorney General concluded that the Act does not apply; however, the Ninth Circuit determined that the opinion does not fully address whether the Act applies to non-commercial speech, and, in any event, is non-binding:

> California's Attorney General has stated that the Act "does not apply to the posting of a sign on private property adjacent to a highway that expresses the property owner's opinion concerning a state or federal public official." While the Attorney General's opinion also expresses doubt that the Act applies to noncommercial messages generally, the actual question it dealt with was much narrower. Moreover, while the Attorney General's opinions are given substantial weight by the California courts, they are not considered controlling.

Maldonado, 370 F.3d at 953 n.5. In any event, the Attorney General's reasoning is circular: "if we construed the Act to cover the expression of a political belief, it would raise serious doubts as to whether its provisions were constitutional under the First Amendment . . . " *Id.* at 8. In other words, the Attorney General reasoned that the Act did not apply to non-commercial speech because if it did apply the Act would be unconstitutional. If the Court were to adopt such reasoning no statute would ever be unconstitutional.

Defendant's reliance on an outlying Eleventh Circuit case is equally unpersuasive. *Southlake Property Assoc., Ltd. v. City of Morrow,* 112 F.3d 1114 (11th Cir. 1997). In *Southlake Property,* the plaintiff asserted that a city ordinance prohibiting off-premises billboards was unconstitutional under *Metromedia* because it lacked an exception for non-commercial speech. *Id.* at 1117. The court held that the ordinance was constitutional because the city had never applied it to prohibit non-commercial speech. *Id.* The Eleventh Circuit also held that all non-commercial speech should be characterized as on-premises, because "an idea, unlike a product, may be viewed as located wherever the idea is expressed." *Southlake Property,* 112 F.3d at 1118. Under this view all non-commercial speech is considered "on-premises."

The theory that all non-commercial speech should be considered "on-premises" has no support in the majority of circuits, including the Ninth Circuit. *See e.g., Clear Channel Outdoor Inc.,* 340 F.3d at 815 ("[t]he amendment creates an exemption for *non-commercial off-site* signs") (emphasis added); *Ackerley Communications Inc. v. City of Cambridge,* 88 F.3d 33, 37 (1st Cir. 1996) ("[t]he only signs containing noncommercial messages that are [on-premises] are those relating to the premises on which they stand, which inevitably will mean signs identifying non-profit institutions"). The Court declines to adopt that theory here.

D. Summary

As COAA applies to non-commercial speech as a matter of law, the Act impermissibly favors commercial over non-commercial speech by prohibiting non-commercial billboards where it permits on-premises commercial billboards. As defendant does not contend that it has a compelling state interest in prohibiting such non-commercial speech, the Act violates the First Amendment. *Metromedia,* 453 U.S. at 513.

III. Remedy

Having concluded that COAA is unconstitutional because it prohibits non-commercial speech where it permits commercial speech, the Court must now determine whether to invalidate COAA partially or in its entirety. The parties' positions are unsurprising: plaintiff argues that the Court should enjoin enforcement of COAA in its entirety, while defendant contends that the Court should enjoin enforcement of COAA merely to the extent that it impermissibly burdens non-commercial speech. The Court will invalidate only the unconstitutional portions of COAA, leaving the rest of the Act intact.

In *Ayotte v. Planned Parenthood,* the Supreme Court reaffirmed the general rule that "when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem." 126 S.Ct. 961, 967 (2006); *accord Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504 (1985) (invalidating only the

unconstitutional provisions of a statute); *United States v. Raines*, 362 U.S. 17, 20-22 (1960) (same); *National Advertising*, 861 F.2d at 249 (same).

Ayotte articulated three interrelated principles to guide the crafting of a remedy. First, a court should try to invalidate no more of a statute than necessary. *Ayotte*, 126 S.Ct. at 967. "Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* at 968 (citation omitted).

"Second, mindful that our constitutional mandate and institutional competence are limited, [courts] restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as [courts] strive to salvage it." *Id.* (*quoting Virginia v. Am. Booksellers Ass'n. Inc.*, 484 U.S. 383, 397 (1988)). A court's "ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly [the appellate courts] have articulated the background constitutional rules at issue and how easily [the court] can articulate the remedy." *Id.*; *see also United States v. Grace*, 461 U.S. 171, 180-183 (1983) (invoking clearly established First Amendment precedent distinguishing between public sidewalks and government buildings as basis for partial invalidation of statute banning expressive displays).

Third, when constructing a remedy a court must always consider legislative intent, "for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte,* 126 S.Ct. at 968 (internal quotation marks and citation omitted). "After finding an application or portion of a statute unconstitutional, [a court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id.*

Ayotte considered the appropriate remedy to a constitutional flaw in New Hampshire's Parental Notification Prior to Abortion Act ("PNPAA"). N.H. Rev.Stat Ann. §§ 132:24-132:28. The district court declared PNPAA facially unconstitutional because it lacked a health exception, invalidated PNPAA in its entirety, and permanently enjoined its enforcement *Id.* at 965. The First Circuit affirmed. *Id.* The Supreme Court concluded that an injunction prohibiting only PNPAA's unconstitutional application was appropriate so long as the lower courts determine that such relief would be consistent with legislative intent. *Id.* at 969.

The *Ayotte* principles mandate partial invalidation of COAA. First, courts must be mindful to invalidate no more of a statute than necessary. *See Planned Parenthood Federation of America, Inc. v. Gonzales,* 435 F.3d 1163, 1184 (9th Cir. 2006) (*citing* Ayotte, 126 S.Ct. at 967).

Second, the background constitutional rules at issue are clearly established: the United States

Supreme Court and lower federal courts have consistently held that a billboard law may not prohibit non-commercial speech where it permits commercial speech. Indeed, in light of this clearly established law, nearly all billboard ordinances explicitly permit non-commercial speech where they permit commercial speech. *See e.g., Clear Channel Outdoor Inc.,* 340 F.3d at 814; *Outdoor Sys., Inc.,* 997 F.2d at 608-609; *see also Nat'l Adver. Co. v. Town of Babylon,* 900 F.2d 551, 556-57 (2d Cir.1990) ("After *Metromedia* struck down the San Diego ordinance as granting more protection to commercial than noncommercial speech, municipalities responded by adding provisions to their sign ordinances to overcome this defect by permitting noncommercial messages wherever commercial messages are allowed"). It is thus a "relatively simple matter" to construct a narrow remedy that enjoins enforcement of COAA only as far as it impermissibly prohibits non-commercial speech. *Ayotte,* 126 S.Ct. at 968 (*quoting United States v. Treasury Employees,* 513 U.S. 454, 459 n.26 (1995)); *see also National Advertising Co.,* 861 F.2d at 250 (invalidating billboard ordinance only as to signs bearing non-commercial messages because the ordinance can function effectively even if so limited).

Third, partial invalidation of COAA is consistent with legislative intent. Defendant argues that it is not the State's intent to prohibit non-commercial speech through COAA, and thus the State prefers partial invalidation of COAA. Moreover, COAA's

stated legislative intent is to maintain aesthetics and safety, not to prohibit non-commercial messages. *See* Cal. Bus. & Prof Code § 5226. That intent is not violated by permitting non-commercial signs where the Act already permits commercial signs. Finally, there is nothing in the statute or legislative history that suggests the legislature explicitly decided to prohibit non-commercial speech where the law permits commercial speech. *Cf. Planned Parenthood v. Gonzales,* 435 F.3d at 1186-88 (invalidating entire "partial birth abortion" statute under *Ayotte* because the legislative history demonstrated that the statute's constitutional flaw – omission of an exception for the health of the woman – was a critical component of the legislation).

Accordingly, the Court will not invalidate COAA in its entirety; instead, the Court will enjoin the State from enforcing COAA to prohibit non-commercial speech wherever the Act permits commercial speech.

CONCLUSION

COAA violates the First Amendment because it favors commercial speech over non-commercial speech by prohibiting non-commercial speech where it permits commercial speech. Accordingly, plaintiff's motion for summary judgment on his facial challenge to the Act's ban on non-commercial speech is GRANTED and defendant's motion for summary judgment on the same issue is DENIED. The State is enjoined from enforcing COAA to prohibit

non-commercial speech where the Act permits commercial speech.

As this Court's holding changes the landscape of this action, the parties shall appear for a Case Management Conference at 8:30 a.m. on Thursday, April 6, 2006 to discuss how to proceed. Prior to the Conference the parties shall meet and confer and submit a joint case management conference statement. The statement shall detail the claims remaining at issue in this lawsuit and how the parties propose to resolve those claims, including whether the State should re-file its motion for summary judgment.

The Court is also concerned that unless and until the State amends COAA to comply with the First Amendment, the Act will continue to have a chilling effect on the exercise of the constitutional right to free speech. Those who read the statute may well believe that they are prohibited from putting up non-commercial signs in certain locations. The parties' case management conference statement shall propose methods for addressing this concern; for example, requiring the State to notify all billboard owners of this Court's ruling.

IT IS SO ORDERED.

Dated: March 23, 2006 /s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,
Plaintiff,
v.
WILL KEMPTON,
Defendant. /

No. C 02 03167 CRB

ORDER

(Filed Feb. 22, 2006)

Pursuant to the discussion in open court on February 17, 2006, the parties are hereby directed to submit supplemental briefing on the issue of an appropriate remedy if the Court finds the statute unconstitutional. Defendant shall file an opening brief no later than March 1, 2006. Plaintiff shall respond no later than March 8, 2006. Defendant may file a Reply by March 15, 2006.

IT IS SO ORDERED.

Dated:
February 22, 2006

/s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

WILL KEMPTON, in his capacity as Director of the California Department of Transportation,

Defendant. /

No. C 02-03167 CRB

ORDER

(Filed Jan. 23, 2006)

Now pending before the Court is plaintiff's motion for summary judgment of his constitutional facial challenge to certain provisions of the California Outdoor Advertising Act, Business & Professions Code § 5200 *et seq.* ("COAA" or "the Act"). After reading the parties' papers, the Court concluded that plaintiff is pursuing claims that have been dismissed from this lawsuit.

Plaintiff owns a billboard adjacent to a "landscaped freeway" as defined by section 5216(a) of the Act. First Amended Complaint at ¶ 30. The Act prohibits all billboard advertising displays adjacent to landscaped freeways. Cal. Bus. & Prof. Code § 5440. However, the Act permits billboard adverisements for (1) the sale or lease of the property upon which the advertising display is placed; (2) to designate the name of the owner or occupant of the premises; (3) to identify the premises; (4) or to

advertise goods or services available on the premises ("on-premises" advertising). Cal. Bus. & Prof. Code § 5442.

The Court has previously ruled that the Act's distinction between on-premises and off-premises advertising is constitutional, and therefore dismissed plaintiff's challenge to the Act to the extent he claimed that distinction was unconstitutional. *See Maldonado v. Kempton*, No. C 02-3167 CRB (N.D. Cal. Oct. 25, 2005) (order granting in part defendant's motion to dismiss). Nonetheless, plaintiff's motion for summary judgment appears to reargue the issue. The Court, however, will not revisit the issue. The remaining issue is whether the Act prohibits all non-commercial speech, and if so, does this prohibition render the Act unconstitutional as it permits on-premises commercial speech.

The Court also previously ruled that plaintiff does not have standing to challenge the permit/license provisions of the Act (Cal. Bus. & Prof. Code Article 4 at §5300 *et seq.*; Cal. Bus. & Prof. Code Article 6 at § 5350 *et seq.*). *See Maldonado v. Kempton*, No. C 02-03167 CRB (N.D. Cal. N.D. Cal. Nov. 27, 2002). Plaintiff did not appeal this ruling, therefore it is the law of the case. *See Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004) (noting that Maldonado did not challenge this Court's ruling that he lacked standing to challenge the provisions of the Act dealing with permits). Plaintiff's challenge to the permit/license provisions is dismissed and will not be considered by the Court.

The oral argument scheduled for January 27, 2006 is continued to 10:00 a.m. on February 17, 2006.

IT IS SO ORDERED.

Dated:
January 20, 2006

/s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

WILL KEMPTON, in his capacity as Director of the California Department of Transportation,

Defendant. /

No. C 02-03167 CRB

ORDER

(Filed Oct. 25, 2005)

Now pending before the Court are defendant's motion to dismiss, plaintiff's motion for judgment on the pleadings, and plaintiff's motion for a default judgment.

Plaintiff's motion for a default judgment is DENIED and plaintiff's motion for judgment on the pleadings is DENIED without prejudice on the ground that it is premature and the number of pages violates the Court's standing orders and the Local Rules.

Defendant's motion to dismiss is GRANTED in part and DENIED in part. It is granted to the extent that plaintiff challenges the California Outdoor Advertising Act's restrictions on off-site commercial advertising. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-510 (1981); *Clear Channel Outdoor, Inc. v. Los Angeles*, 340 F.3d 810, 815-16 (9th Cir. 2003); *Ackerley Communications of*

Northwest v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997). In all other respects defendant's motion is denied. Plaintiff has demonstrated standing to challenge the Act's alleged restrictions on noncommercial advertising. Judicial estoppel does not bar plaintiff from alleging that the Act applies to his billboard, and defendant has not established that the Act exempts noncommercial speech. *See Maldonado v. Harris*, 370 F.3d 945, 953 n.5 (9th Cir. 2004).

IT IS SO ORDERED.

/s/ Charles Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

Dated: October 25, 2005

CIVIL MINUTES

(Filed Jun. 28, 2005)

Judge CHARLES R. BREYER

Date: **June 17, 2005**

C-02-03167CRB

NANO MALDONADO v. JEFF MORALES

Attorneys: Dennis Zell Roland Tillah

Deputy Clerk: **BARBARA ESPINOZA** Reporter: **Sahar McVickar**

	PROCEEDINGS:	**RULING:**
1.	D's Motion to Dismiss	Denied
2.	D's Petition to be Relieved of Compliance with FRCP Rule 12(g)	Denied
3.		

ORDERED AFTER HEARING:

Amended Complaint to be filed by 7/08/2005; Motions filed by 8/12/2005

( ) ORDER TO BE PREPARED BY:
Plntf ___ Deft ___ Court ___

( ) Referred to Magistrate Judge For: _____
( ) By Court ( ) Parties to approach Chief Magistrate in future

(X) CASE CONTINUED TO October 14, 2005 @10:00 a.m. for Motions

Discovery Cut-Off ____ Expert Discovery Cut-Off ____

Pltf to Name Experts by __ Deft to Name Experts by __

P/T Conference Date ____ Trial Date ___ Set for __ days

Type of Trial: ( ) Jury ( ) Court

Notes: _____

_____

_____

_____

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 4, 2005

Mr. Dennis Scott Zell
Janet Fogarty & Associates
1633 Old Bayshore Highway
Suite 232
Burlingame, CA 94010

Re: Will Kempton, Director, California Department of Transportation v. Nano Maldonado
No. 04-746

Dear Mr. Zell:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied. Justice Breyer took no part in the consideration or decision of this petition.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANO MALDONADO,
Plaintiff-Appellant,
v.
JEFF MORALES, in his capacity as Director of the California Department of Transportation.
Defendant-Appellee.

No. 03-15007
D.C. No. CV-02-03167-CRB
Northern District of California, San Francisco
ORDER
(Filed Aug. 27, 2004)

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief IT Judge.

The panel has voted to deny the petition for panel rehearing. Judge Reinhardt votes to deny the petition for rehearing en banc and Judges B. Fletcher and Restani so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

370 F.3d 945

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NANO MALDONADO,

Plaintiff-Appellant,

v.

TONY HARRIS, in his capacity as Acting Director of the California Department of Transportation,*

Defendant-Appellee.

No. 03-15007

D.C. No. CV-02-013167-CRB

OPINION

Appeal from the United States District Court for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
March 10, 2004 – San Francisco, California

Filed June 4, 2004

* Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Tony Harris, the Acting Director of Caltrans, has been substituted as Appellee for his predecessor, Jeff Morales. The Clerk will revise the docket in this case to reflect the substitution.

Before: Betty B. Fletcher, Stephen Reinhardt, Circuit Judges, and Jane A. Restani, Judge.**

Opinion by Judge Betty Binns Fletcher

COUNSEL

Dennis Scott Zell, Janet Fogarty & Associates, Burlingame, California, for the plaintiff-appellant.

Daniel P. Weingarten, Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

B. FLETCHER, Circuit Judge:

Nano Maldonado appeals the district court's dismissal of his action under 42 U.S.C. § 1983, which raises several First Amendment challenges to California's Outdoor Advertising Act. The district court held that, insofar as Maldonado's constitutional claims were ripe for review, it lacked jurisdiction to review them under the *Rooker-Feldman* doctrine. The district court also held that some of Maldonado's challenges were precluded under California law because of Maldonado's failure to raise the claims in an earlier state proceeding. Based on these findings, the

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** The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

district court granted the defendant's motion to dismiss. Maldonado brought this timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse.

I. Background and Procedural History

This case is the latest chapter in a long-running dispute between Maldonado and the California Department of Transportation ("Caltrans").[1] Since 1991, Maldonado has owned a commercial building adjacent to U.S. Highway 101 in Redwood City, California, as well as a double-sided billboard that is mounted on the roof of the building. Caltrans is responsible for enforcing California's Outdoor Advertising Act ("COAA" or "the Act"), Cal. Bus. & Prof. Code §§ 5200-5486 (West 2003), which generally regulates advertising displays that are visible from and are placed near interstate and primary highways in California. *See* Cal. Bus. & Prof. Code § 5271.

In 1993, Maldonado applied to Caltrans for a permit to use his Redwood City billboard for off-premises advertising. The application was denied because Maldonado's billboard stands along a segment of Highway 101 classified as a "landscaped freeway." COAA prohibits billboard advertisements along landscaped freeways unless the advertisement is for

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[1] We will refer to the defendant in this case as "Caltrans," even though the actual party defending the case is Tony Harris, the acting director of Caltrans.

products or services offered on the premises. *See* Cal. Bus. & Prof. Code §§ 5440, 5442.[2] Since the denial of the permit, Maldonado has been attempting to get around the restrictions in COAA. In 1996, Maldonado was cited by Caltrans for posting off-premises advertisements on the billboard. Maldonado challenged the citation administratively, contending that the advertisements at issue comported with COAA because the businesses involved had also leased space in the building. The administrative board rejected Maldonado's contentions.

Because Maldonado persisted in his off-premises advertising, Caltrans brought a state nuisance suit against him in July 1998. In his answer, Maldonado raised a number of defenses under state law, but both sides agree that he did not raise any arguments regarding the constitutionality of the Act. After a bench trial, the state trial court entered judgment against Maldonado including a permanent injunction generally restricting his ability to post further advertisements on his billboard. Maldonado's appeals to California's appellate courts were rejected. *See People ex rel. Dep't of Transp. v. Maldonado,* 104 Cal. Rptr. 2d 66 (Cal. Ct. App. 2001). At no time did Maldonado raise federal constitutional claims during the litigation.

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[2] The statute also allows advertisements offering the property on which they are situated for sale or lease, or which simply identify the owner or occupant of the building. *See* § 5442.

Despite the state court rulings, Maldonado continued to test the advertising restrictions in the Act. He has twice been found in contempt of the state court injunction. Shortly before filing the complaint in this case, he posted a sign – which he describes as "political/religious" – which includes the messages "IN GOD WE TRUST"; "WE PRAY FOR WORLD PEACE"; and "HELP STOP TERRORISM." The sign also lists the phone numbers for the San Mateo County Sheriff's Department, the F.B.I. and the Red Cross, and also adds the message "Available for on site use" and a phone number. On the other side of the billboard, Maldonado posted a sign from the non-profit group Habitat for Humanity.

On July 2, 2000, Maldonado filed the instant action in the District Court for the Northern District of California. Maldonado's complaint alleged that the Act violated the First Amendment on its face and as it had been applied to him and his various advertisements. Maldonado sought a permanent injunction restraining enforcement of the Act, including any attempts by Caltrans to "enforce any injunction based upon" the Act.

Caltrans moved to dismiss the case on various grounds and the district court granted the motion. The district court concluded that Maldonado lacked standing to challenge the provisions of the Act dealing with permits and scenic highways, a conclusion that Maldonado does not challenge in this appeal. The district court also found that Maldonado's constitutional challenge on the prohibition of "off-premises"

commercial advertising was barred by claim preclusion. Finally, the district court found that, to the extent they were ripe for review, all of Maldonado's claims were barred by the *Rooker-Feldman* doctrine.

Maldonado filed a timely notice of appeal.

II. Standard of Review

We review a district court's dismissal of an action de novo, whether the dismissal is based on claim preclusion, ripeness or the *Rooker-Feldman* doctrine. *Stewart v. U.S. Bancorp,* 297 F.3d 953, 956 (9th Cir. 2002); *Ross v. Alaska,* 189 F.3d 1107, 1114 (9th Cir. 1999); *Olson Farms, Inc. v. Barbosa,* 134 F.3d 933, 936 (9th Cir. 1998). We may affirm a dismissal on any basis supported by the record, even if the district court relied on different grounds or reasoning. *Groten v. California,* 251 F.3d 844, 851 (9th Cir. 2001).

III. Discussion

A. *Rooker-Feldman* Doctrine

The district court found that all of Maldonado's challenges to COAA were barred by the *Rooker-Feldman* doctrine.[3] The basic premise of *Rooker-Feldman* is that "a federal district court does not have subject matter jurisdiction to hear a direct appeal

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[3] The doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

from the final judgment of a state court." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). *Rooker-Feldman* recognizes the implicit statutory structure established by Congress, which has determined that the United States Supreme Court is the only federal court with jurisdiction to hear appeals from state courts. *See* 28 U.S.C. § 1257; *Noel*, 341 F.3d at 1154-55.

We recently recognized that, while the basic premise of the *Rooker-Feldman* doctrine is relatively simple, it has not been applied consistently in the lower federal courts. *Noel*, 341 F.3d at 1162-63. In *Noel*, we set forth a general formulation of *Rooker-Feldman* to attempt to clarify the scope of the doctrine. We explained that

> [i]f a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction.

Id. at 1164. We further noted that even if a federal suit was not barred by *Rooker-Feldman*, it might nonetheless be claim-precluded under res judicata principles. *Id.* We cautioned, however, that the issue of claim preclusion is distinct from the *Rooker-Feldman* question. *Id.*

When we apply the *Noel* formulation of the *Rooker-Feldman* doctrine to the facts of this case, it becomes clear that the doctrine does not deprive the district court of jurisdiction over any of Maldonado's claims. The legal wrong that Maldonado asserts in this action is not an erroneous decision by the state court in the nuisance suit brought against Maldonado by Caltrans, but the continued enforcement by Caltrans of a statute Maldonado asserts is unconstitutional. In other words, Maldonado asserts as a legal wrong "an allegedly illegal act . . . by an adverse party." *Noel,* 341 F.3d at 1164. Under these circumstances, *Noel* makes clear that *Rooker-Feldman* does not apply.

The district court relied on a passage in *Fontana Empire Center, LLC v. City of Fontana,* 307 F.3d 987, 992 (9th Cir. 2002), where we stated that the *Rooker-Feldman* doctrine "precludes a federal district court from exercising jurisdiction over general constitutional challenges that are 'inextricably intertwined' with claims asserted in state court." We recognize that this statement in *Fontana* can be misleading when it is read out of context. However, as we explained in *Noel,*

> [t]he premise for the operation of the "inextricably intertwined" test . . . is that the federal plaintiff is seeking to bring a forbidden de facto appeal. The federal suit is not a forbidden appeal because it is "inextricably intertwined" with something. Rather, it is simply a forbidden de facto

> appeal. Only when there is already a de facto appeal in federal court does the "inextricably intertwined" test come into play: Once a federal plaintiff seeks to bring a forbidden de facto appeal, as in *Feldman*, the federal plaintiff may not seek to litigate an issue that is "inextricably intertwined" with the state judicial decision from which the forbidden de facto appeal is brought.

Noel, 341 F.3d at 1158. In this case, Maldonado is not bringing a forbidden de facto appeal because he is not alleging as a legal wrong an erroneous decision from the state court. *See id.* at 1164. Therefore, the "inextricably intertwined" test does not come into play.

Our conclusion remains the same even though Maldonado's complaint seeks relief from the injunction entered by the state court. In a recent decision we made clear that, even when a federal plaintiff is expressly seeking to set aside a state court judgment, *Rooker-Feldman* may not apply. *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004). In *Kougasian*, the federal plaintiff sought to set aside two state court judgments on the ground that its adversary had committed extrinsic fraud on the state court. We rejected the district court's conclusion that *Rooker-Feldman* barred the action, noting that, for *Rooker-Feldman* to apply, "a plaintiff must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief."

Kougasian, 359 F.3d at 1140. As we have already explained, Maldonado does not allege any legal errors by the California state court as a basis for relief, and *Rooker-Feldman* therefore does not bar his federal action.

B. Claim Preclusion

The district court found that some of Maldonado's constitutional challenges to COAA were barred by claim preclusion because he had failed to raise them in the earlier state nuisance action. 28 U.S.C. § 1738 generally requires federal courts to give state court judgments the same res judicata effect that they would be given by another court of that state. *Migra v. Warren City Sch. Dist. Bd. of Ed.,* 465 U.S. 75, 84 (1984); *Albano v. Norwest Fin. Haw., Inc.,* 244 F.3d 1061, 1063 (9th Cir. 2001). We must therefore look to California law to determine the preclusive effect of the state court judgment entered against Maldonado. *Albano,* 244 F.3d at 1063. Caltrans argues that Maldonado's claims are barred under two different aspects of California law: California's compulsory cross-complaint statute and common law claim preclusion principles.

1. Claim Preclusion Under California's Compulsory Cross-Complaint Statute

California's compulsory cross-complaint statute provides that, except for some situations not relevant here,

> if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.

Cal. Civ. Proc. Code § 426.30 (West 1973 & Supp. 2004). The statute elsewhere defines "related cause of action" as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." Cal. Civ. Proc. Code § 426.10(c).

At first glance, the compulsory cross-complaint provision appears to bar at least some of Maldonado's claims. Maldonado's current constitutional challenges to COAA were certainly "related causes of action," within the meaning of the statute, to the state nuisance action that Caltrans brought against Maldonado in 1998. On closer inspection, however, it becomes clear that the cross-complaint provision is inapplicable in this case. Section 426.30 requires a defendant in a state court action in California to raise any related causes of action which he has against the *plaintiff* in that action. The plaintiff in the 1998 nuisance action against Maldonado was Caltrans. *See People ex rel. Dep't of Transp. v. Maldonado,* 104 Cal. Rptr. 2d 66 (Cal. Ct. App. 2001). Maldonado, however, could not have filed a cross-complaint

against Caltrans under 42 U.S.C. § 1983 raising the constitutional challenges he raises here. State agencies (such as Caltrans) are not "persons" within the meaning of § 1983, and are therefore not amenable to suit under that statute. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 70 (1989). In other words, Maldonado had no "cause of action" against Caltrans under § 1983. We recognize that Maldonado could have brought a cross-complaint under § 1983 against the director of Caltrans as part of the 1998 nuisance action. *See* Cal. Civ. Proc. Code § 428.10(b) (allowing permissive cross-complaints against parties other than the original plaintiff). The fact that Maldonado *could* have brought a cross-complaint, however, does not mean that he was *required* to do so. *See Eanerian v. O'Malley,* 116 Cal. Rptr. 919, 924 (Cal. Ct. App. 1974) (stating that, "[e]xcept as between plaintiffs and defendants, there is no compulsory cross-complaint in California procedure," and that a cross-complaint is permissive between parties and nonparties). Under the plain language of § 426.30, Maldonado was not required to bring a § 1983 action against the director of Caltrans because the director was not the plaintiff in the state nuisance action.[4]

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[4] We note that our reading of § 426.30 is consistent with the California courts' recognition that preclusion provisions like the compulsory cross-complaint statute should be read narrowly. *See Datta v. Staab,* 343 P.2d 977, 980 (Cal. Ct. App. 1959) (stating that the predecessor to § 426.30 "should be narrowly construed"); *see also Carroll v. Import Motors, Inc.,* 39

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2. Common Law Claim Preclusion

The district court found that Maldonado's claims were also barred under common law principles of claim preclusion. In California, a final judgment precludes further proceedings if they are based on the same cause of action. *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438 (9th Cir. 1985). California courts employ the "primary rights" theory to determine what constitutes the same cause of action for claim preclusion purposes:

> [A] cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a primary right gives rise to but a single cause of action. . . . As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered.

Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 306-07 (Cal. 2002) (quoting *Crowley v. Katleman*, 881 P.2d 1083, 1090 (Cal. 1994) (citations and internal quotations omitted)). If the "primary right" sought to be vindicated in a subsequent litigation is the same as that in an earlier suit, the second action will be

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Cal. Rptr. 2d 791, 796 (Cal. Ct. App. 1995) (noting, in the context of § 426.30, that "equity abhors a forfeiture").

claim precluded under California law. *See Mycogen Corp.*, 51 P.3d at 306.

The district court found Maldonado's constitutional claims barred because it concluded that the same primary right was involved in both the 1998 state nuisance suit and the instant action, namely, Maldonado's right to engage in off-premises advertisement on his billboard. This conclusion stems from a misreading of California law, however. The primary right in the state nuisance action was not Maldonado's right to advertise on his billboard, but the right of the people of California to be free from obtrusive advertising displays along major highways. This was a statutory right that had been created by the state's Legislature. *Cf.* Cal. Bus. & Prof. Code § 5226 (stating that regulation of highway advertisements was necessary "to promote the public safety, health, welfare, convenience and enjoyment of public travel . . . "). On the other hand, the primary right involved in the instant action is the one identified by the district court: Maldonado's right to advertise freely on his property, a right that Maldonado claims is protected by the First Amendment. Because the primary rights involved in the two suits are different, the causes of action are also different, and the judgment against Maldonado in the nuisance action therefore does not bar any of his federal claims.

The decision of the California Court of Appeal in *Morris v. Blank*, 114 Cal. Rptr. 2d 672 (Cal. Ct. App. 2001), supports our conclusion. In *Morris*, the original

plaintiff, Morris, filed a negligence action against Blank in state superior court following a car accident. While this suit was pending, Blank filed a negligence action in municipal court against Morris, which Blank was able to settle with Morris' insurer. Blank then went back to superior court and claimed that the settlement of the municipal court action barred the action Morris had initially filed. The trial court agreed and dismissed Morris' suit. The California Court of Appeal reversed, finding that claim preclusion did not bar Morris' superior court action because the causes of action were not identical: "Here, Morris' superior court litigation is on a different cause of action . . . involving separate and distinct torts, namely, Blank's negligence, from those at issue in Blank's municipal court case, namely, Morris' negligence." *Morris,* 114 Cal. Rptr. 2d at 678 (internal quotations omitted). *Morris* illustrates that, even though two suits involve the same nucleus of facts, they do not necessarily raise the same cause of action under California law. *See also Branson v. Sun-Diamond Growers,* 29 Cal. Rptr. 2d 314, 321 n.6 (Cal. Ct. App. 1994) (refusing to apply a "nucleus of facts" test for claim preclusion purposes).

The district court therefore erred in dismissing Maldonado's claims on the ground that they are barred by claim preclusion under California law.

C. Ripeness

The district court concluded that, to the extent that the *Rooker-Feldman* doctrine did not apply, Maldonado's challenge to the application of COAA to his current advertisements was not ripe because it was unclear whether the statute would be enforced against those advertisements.

In *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc), we set out a framework to analyze whether a constitutional challenge to a state statute before its enforcement was ripe for review. We explained that the ripeness inquiry focuses on two different components: a constitutional component and a prudential component. *Id.* at 1138. The constitutional component of the inquiry focuses on three factors: (1) whether the plaintiffs have articulated a "concrete plan" to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute. *Id.* at 1139. Maldonado's suit fares well as far as the first and third factors are concerned: Maldonado alleges that his current conduct is in violation of COAA,[5] and Caltrans has undoubtedly

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[5] Counsel for Caltrans asserted at oral argument that COAA does not apply to non-commercial advertisements, although he could point to nothing in the statute in support of that assertion. California's Attorney General has stated that the Act "does not apply to the posting of a sign on private property

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enforced the statute against Maldonado in the past. Although the second factor is a closer question, it also tends to favor Maldonado: while there may not have been specific threats of enforcement against his current signs, the fact that an injunction had been entered against Maldonado certainly qualifies as a threat of enforcement. We therefore conclude that Maldonado's First Amendment challenge meets the constitutional component of ripeness.

In *Thomas,* we also pointed to a prudential component of ripeness, and we noted that the analysis of this component was guided by two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas,* 220 F.3d at 1141 (quoting

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adjacent to a highway that expresses the property owner's opinion concerning a state or federal public official." 79 Ops. Cal. Atty. Gen. 117 (1996). While the Attorney General's opinion also expresses doubt that the Act applies to noncommercial messages generally, *see id.* at 3-4, the actual question it dealt with was much narrower. Moreover, while the Attorney General's opinions are given substantial weight by the California courts, they are not considered controlling. *See Thorning v. Hollister Sch. Dist.,* 15 Cal. Rptr. 2d 91, 94 (Cal. Ct. App. 1992). In any event, nothing in the statute creates an exception for non-commercial advertisements and no controlling caselaw has construed the Act in the manner Caltrans suggests. *Cf.* Cal. Bus. & Prof. Code §§ 5202, 5203 and 5221 (defining "advertising displays" broadly with only narrow exceptions not including non-commercial advertisements), and Cal. Bus. & Prof. Code § 5440 (providing that "no advertising display" shall be placed adjacent to a landscaped freeway except as provided in the Act).

Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). Maldonado's suit meets the first prong because there has been no contention that the record needs to be developed further in order for the district court to be able to address the constitutional challenge. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir. 2001) ("If a controversy is essentially legal in nature, it is fit for judicial decision.") (*quoting W. Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990)) (internal quotation and citation omitted). The second factor also weighs in favor of Maldonado because withholding consideration of his claims will require him to risk being found in contempt of the state court injunction in order to be able to challenge the constitutionality of the statute. *Cf. City of Auburn*, 260 F.3d at 1171 ("If promulgation of the challenged regulations presents plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation, the controversy is ripe.") (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993)). Maldonado's suit therefore also meets the prudential component of ripeness.

In sum, we hold that Maldonado's constitutional claims are ripe for review.

D. Statute of Limitations

Finally, Caltrans argues that Maldonado's First Amendment challenges are barred by the statute of limitations applicable to § 1983 actions. The district

court did not reach this issue because it had disposed of all of Maldonado's claims on other grounds. Nonetheless, we examine this issue to determine whether we can affirm the district court's dismissal of Maldonado's claims on this ground. *See Groten v. California,* 251 F.3d 844, 851 (9th Cir. 2001).

In determining the proper statute of limitations for actions brought under 42 U.S.C. § 1983, we look to the statute of limitations for personal injury actions in the forum state. *See Azer v. Connell,* 306 F.3d 930, 935 (9th Cir. 2002). We have therefore held that California's one-year statute of limitations for personal injury actions applies to § 1983 suits in federal court. *See DeGrassi v. City of Glendora,* 207 F.3d 636, 644 (9th Cir. 2000). California's legislature, however, has recently revised the relevant statute of limitations, extending it to two years. *See* 2002 Cal. Legis. Serv. Ch. 448 (S.B. 688) (West); Cal. Civ. Proc. Code § 335.1 (West Supp. 2004). Maldonado argues that we should apply the two-year period. The extension of the statute of limitations, however, did not become effective until January 1, 2003, several months after Maldonado filed his complaint. Under California law, an extension of a statute of limitations will not apply to claims already barred under the prior statute of limitations unless the Legislature explicitly provides otherwise. *See Douglas Aircraft Co. v. Cranston,* 374 P.2d 819, 822 (Cal. 1962); *see also W. Sec. Bank, N.A. v. Superior Court,* 933 P.2d 507, 513 (Cal. 1997) ("A basic canon of statutory interpretation is that

statutes do not operate retrospectively unless the Legislature plainly intended them to do so."). In enacting the new two-year statute of limitations, the California Legislature made it applicable retroactively only to the victims of the terrorist attacks of September 11, 2001. *See* 2002 Cal. Legis. Serv. Ch. 448, § 4 (S.B. 688) (West). The recent extension is therefore inapplicable to Maldonado's claims, and we consider the question under the one-year period. *Accord Krupnick v. Duke Energy Morro Bay, LLC,* 9 Cal. Rptr. 3d 767 (Cal. Ct. App. 2004) (holding that 2-year statute of limitations did not apply retroactively to claims already barred).

Because Maldonado filed the complaint in this case on July 2, 2002, any claims that had accrued before July 2, 2001 are barred by the statute of limitations. Federal law determines when a civil rights claim accrues. *Knox v. Davis,* 260 F.3d 1009, 1013 (9th Cir. 2001). "Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quoting *TwoRivers v. Lewis,* 174 F.3d 987, 992 (9th Cir. 1999)). Under this standard, we find it clear that, to the extent that Maldonado challenges the application of COAA to the indisputably commercial signs he posted in the mid-1990s, the statute of limitations bars his claims. Maldonado certainly knew that Caltrans was enforcing COAA against his off-premises commercial advertisements by the time Caltrans filed a nuisance suit against him in July 1998. It seems equally clear, however, that Maldonado's challenge to the application of COAA as to his current signs – which he

argues are non-commercial – is not barred by the statute of limitations, since he alleges that he did not post those advertisements until a few days before the complaint was filed.

A more difficult question is whether Maldonado's facial challenge of the statute is barred by the statute of limitations. In fact, whether a statute of limitations for § 1983 actions can bar a facial challenge under the First Amendment to a state statute appears to be a question that has not been conclusively resolved by any Circuit court. We join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations, *see Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991),[6] but we

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[6] We note that a significant number of district courts have held that facial challenges under the First Amendment are not subject to the statutes of limitation applicable to § 1983 actions. *See Napa Valley Publishing Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1184 (N.D. Cal. 2002); *Fryev. City of Kannapolis*, 109 F. Supp. 2d 436, 439-40 (M.D.N.C. 1999); *Lavey v. City of Two Rivers*, 994 F. Supp. 1019, 1023 (E.D. Wis. 1998), *aff'd*, 171 F.3d 1110 (7th Cir. 1999); *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1364-65 (C.D. Cal. 1995).

We also note that facial challenges under the First Amendment are fundamentally different from those brought under the Takings Clause. In the latter context, we have held that a statute of limitations can bar facial challenges. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-88 (9th Cir. 1993). However, as we explained in *Levald*,

> [i]n the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced

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need not resolve the broader question here because we conclude that, under the circumstances present in this case, the statute of limitations does not bar Maldonado's facial challenge. In *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1063 (9th Cir. 2002), we held that the district court had erred in dismissing a First Amendment facial challenge because the statute had actually been enforced against the plaintiffs during the statute of limitations period. In this case, Caltrans had enforced the statute in the most narrow sense in 1998 when it brought a state nuisance action against Maldonado. We conclude, however, that the fact that the state court entered a permanent injunction against Maldonado constituted a continuing enforcement of the statute against Maldonado, such that he is allowed to raise a facial challenge to the statute at any time so long as the injunction continues to be in force.

We therefore hold that the statute of limitations does not bar Maldonado's facial challenge to COAA, nor his as-applied challenge relating to the current, allegedly non-commercial advertisements.

> the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Id. at 688.

IV. Conclusion

We hold that the district court erred in dismissing Maldonado's challenges to California's Outdoor Advertising Act on the ground that they were barred on *Rooker-Feldman*, claim preclusion or ripeness grounds. We also hold that Maldonado's challenge to his earlier, indisputably-commercial signs is barred by the statute of limitations, but that his facial challenge to the statute and his as-applied challenge relating to non-commercial advertisements are not barred. We therefore reverse the dismissal of Maldonado's § 1983 action and remand so that Maldonado's claims may be heard on the merits.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

JEFF MORALES, in his capacity as Director of the California Department of Transportation,

Defendant. /

No. C 02-03167 CRB

MEMORANDUM AND ORDER

In this section 1983 action plaintiff challenges the constitutionality of California's "Outdoor Advertising Act" which limits freeway billboard advertising. After carefully considering the pleadings, and having had the benefit of oral argument on two occasions, the Court GRANTS defendant's request for judicial notice and GRANTS defendant's motion to dismiss.

BACKGROUND

A. Factual Background

Plaintiff owns a commercial building located at 3600 Rolison Road adjacent to the southbound lanes of Highway 101 in Redwood City, California. In the mid-1950's a double-sided billboard was mounted on the roof of the building. Plaintiff purchased the building in 1990 or 1991.

In March 1993 plaintiff applied to the California Department of Transportation ("Caltrans") for a permit to use the billboard for an off-premise display. An off-premise display is a display advertising goods or services not offered at the location of the billboard. Caltrans denied the permit because the proposed advertisement would be along a segment of Highway 101 classified as "landscaped freeway." California's Outdoor Advertising Act, Business and Professions Code § 5200 *et seq.*, prohibits billboard advertising along a "landscaped freeway" unless the billboards advertise goods or services available at the property on which the billboard is placed ("on premises" advertising).

In October 1993 Caltrans cited plaintiff for violating the Act. He was cited again in 1996. Plaintiff subsequently sought review by the California Outdoor Advertising Review Board. Plaintiff argued that his billboards (advertising goods and services such as the Stanford Shopping Center, a Holiday Inn, Skyway Cellular and Stanford University football tickets) were on-premises advertising because the goods and services advertised were available on plaintiff's premises. The Board disagreed. Plaintiff still did not remove the offending advertisements and Caltrans filed suit in state court to abate a public nuisance, namely, the billboard advertisements.

After a trial the Superior Court found that the advertisements were for "off-premises goods and services." The court rejected plaintiff's argument that because he made an office available on the premises

to those who advertised their goods and services, the advertisements were for on-premises goods and services. The court entered an injunction enjoining plaintiff from displaying any advertising on his billboard that is not truly on-premises advertising, as more fully defined in the order.

Plaintiff appealed and the appellate court affirmed. The California Supreme Court denied review on March 28, 2001. Despite the state court rulings, plaintiff did not remove the signs. On June 11, 2001, in response to an order to show cause, plaintiff admitted to acting in contempt of the order by continuing to display off-premises advertising.

Later that year plaintiff placed a sign on both sides of his billboard reading "AVAILABLE FOR ON SITE USE 650-366-2979." In February 2002 the trial court found plaintiff in contempt of the court's injunction and fined him $1000.00 plus attorneys fees.

Plaintiff still did not give up. Shortly after he was found in contempt he placed a sign on one side of his billboard reading as follows:

IN GOD WE TRUST
WE PRAY FOR WORLD PEACE
HELP STOP TERRORISM

The sign also lists telephone numbers for the San Mateo County Sheriff, the F.B.I. and the Red Cross, and repeats the message for which he was previously found in contempt, namely, "AVAILABLE FOR ON

SITE USE 650-366-2979." The other side of the billboard displays a message and telephone number for Peninsula Habitat for Humanity.

B. Procedural History

Before Caltrans took any action against plaintiff for the above signs, plaintiff filed this action broadly challenging the constitutionality of the Outdoor Advertising Act on its face and as applied to him. Paragraph 11 of the complaint identifies those provisions of the Outdoor Advertising Act that plaintiff alleges are unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Paragraph 11(a) identifies provisions requiring license and permit fees to engage in outdoor advertising. Paragraph 11(b) identifies provisions plaintiff claims are "offensive content based prohibitions, restrictions, and penalties" on their face and as applied to plaintiff in the past. These "offending provisions" include: (1) the prohibition on outdoor advertising next to a landscaped freeway, California Business and Professions Code ("B&P Code") § 5440; (2) the prohibition on outdoor advertising along a scenic highway, B&P Code § 5440.1; (3) the provision providing for removal of signs in violation of B&P Code § 5440, B&P Code § 5441; (4) the exception to section 5440's prohibition for on-site advertising, B&P Code § 5442; (5) other exceptions to section 5440's prohibition, B&P Code § 5442.5; (6) the provision declaring violations of the advertising prohibitions a public nuisance, B&P Code § 5461; (7) the provision

permitting revocation of a license or permit, B&P Code § 5463; (8) the provision making a violation of the Act a misdemeanor, B&P Code § 5464; and (9) a penalties provision, B&P Code § 5482.

Plaintiff seeks a permanent injunction prohibiting the Caltrans Director from enforcing the Outdoor Advertising Act, including those provisions that (1) require a permit and/or license fee; (2) prohibit outdoor advertising along a landscaped freeway; and (3) prohibit outdoor advertising along a scenic highway. He specifically requests that this Court enjoin Caltrans from enforcing the state court injunction. Complaint at p. 20 ("Said prohibition to include any attempt by defendant to enforce any injunction based upon" the Outdoor Advertising Act). He claims the Act violates the First Amendment on its face and as applied to him.

Defendant originally moved to dismiss the complaint on the ground that it is barred by the one-year statute of limitations and judicial estoppel. He argued that plaintiff learned of his injury – not being able to conduct off-premises advertising – at the latest in March 2001, when the California Supreme Court denied review, more than one year (the applicable statute of limitations) before plaintiff filed this suit. He also argued that plaintiff is judicially estopped from challenging the constitutionality of the statute because plaintiff did not raise the issue in the state court proceedings. He contended that it would be unfair to allow plaintiff to relitigate matters that should have been raised in the state court.

Plaintiff responded that this action arises from a new injury; namely, the February 2002 contempt judgment and his fear that he will be found in contempt or fined for his new signs.

At oral argument the Court directed the parties to file supplemental memoranda on whether plaintiff's complaint is barred by res judicata as defendant's judicial estoppel argument was in essence a res judicata argument. Now before the Court are the parties' supplemental memoranda. Defendant now argues that the claims are barred by res judicata and the Rooker-Feldman doctrine.

DISCUSSION

A. Standing

Plaintiff's challenge to many of the allegedly offending statutory provisions must be dismissed because he does not have standing:

> The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III. A plaintiff must satisfy the injury-in-fact requirement by alleging that she "has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" A plaintiff may allege a future injury in order to comply with this requirement, but only if he or she "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of

> injury is both real and immediate, not conjectural or hypothetical."

Scott v. Pasadena Unified School Dist., 306 F.3d 646, 656 (9th Cir. 2002).

There is no case or controversy with respect to plaintiff's challenge to the permit/license requirements and the prohibition on advertising next to a scenic highway. Plaintiff owns a billboard next to *landscaped* freeway; he is absolutely prohibited from engaging in off-premises outdoor advertising at that location. Thus, the permit and license provisions do not apply to him. *See* Appellate Opinion at 8 ("So long as the portion of Highway 101 alongside appellant's property is designated 'landscaped freeway,' permits are irrelevant to any advertising thereon."). Accordingly, he does not have standing to challenge the permit and license fees and requirements. For the same reason he does not have standing to challenge the outdoor advertising prohibition with respect to scenic highways.

Plaintiff does have standing to challenge the prohibition on off-site outdoor advertising along landscaped freeways. As is explained below, however, that challenge is barred by res judicata and the Rooker-Feldman doctrine.

B. Res judicata

The question presented is whether and to what extent the state court judgment barring plaintiff from

engaging in outdoor advertising at his Redwood City location *in the future* bars his claim for an injunction prohibiting the Outdoor Advertising Act from being applied to him at this Redwood City location in the future. The preclusive effect of a state court judgment in federal court is based on state preclusion law. *See Howard v. America Online Inc.*, 208 F.3d 741, 748 (9th Cir. 2000); *see also Bybee v. A-Mark Precious Metals, Inc. (In re Bybee)*, 945 F.2d 309, 316 (9th Cir. 1991) ("[T]he res judicata effect of a previous state court judgment is determined by the law of the rendering court.").

"In California, a final judgment, 'even if erroneous,' acts as a bar to all other claims arising from the 'invasion of one primary right,' that is, to all other claims arising from the same injury." *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir. 2002). "[T]he claim arises from the harm suffered, as opposed to the particular theory of the litigant. Even when multiple legal theories for recovery exist, one injury gives rise to only one claim for relief" *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438 (9th Cir. 1985). "This bar applies whether or not the claim was actually adjudicated in the prior proceeding, . . . and, under California's compulsory cross-complaint rules, it applies to defendants as well as to plaintiffs." *Holder*, 305 F.3d at 864.

The filing of compulsory cross-complaints under California law is governed by Code of Civil Procedure section 426.30. It provides, with certain exceptions not relevant here, that "[i]f a party against whom a

complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." C.C.P. § 426.30(a). A related cause of action is a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." C.C.P. § 426.10; *see also Cheiker v. Prudential Ins. Co. of America*, 820 F.2d 334, 336-37 (9th Cir. 1987) (applying rule).

Plaintiff's constitutional challenge to the prohibition on off-premises outdoor advertising adjacent to landscaped freeways is barred by claim preclusion. The state court order enjoining plaintiff from engaging in such advertising is unquestionably a final judgment. Moreover, his claim that the statute violates the First Amendment on its face and as applied to him was a compulsory counterclaim to the nuisance action. His constitutional challenge is related to the nuisance action, that is, it arises out of the same series of transactions or occurrences, namely, plaintiff's attempts to engage in outdoor off-premises advertising at the Redwood City location.

Plaintiff responds that this action arises out of a different primary right, namely, the right to display his current advertisements and therefore is not barred. He argues that the Habitat For Humanity Sign is not off-site advertising. He also argues that

Habitat For Humanity is a non-profit and that advertisements of non-profit activities are entitled to greater speech protection than advertisements for for-profit businesses. He contends that his other messages are religious and political and therefore cannot be barred under the statute. He also contends that he is not challenging any of the state court judgments. Finally, despite all of those disclaimers, he asserts that he is still challenging the application of the statute to commercial advertising.

The primary right adjudicated in the state court proceedings was the right to engage in off-site commercial advertising at 3600 Rolinson Road in Redwood City. Any claim in this case that plaintiff has a constitutional right to engage in such commercial off-site advertising is barred by res judicata. Thus, to the extent plaintiff challenges as unconstitutional the statute's bar on outside off-premises advertising along a landscaped freeway, his claim must be dismissed. To hold otherwise would completely eviscerate the policy behind claim preclusion.

Plaintiff's claim that the statute is unconstitutional as applied to his current billboards because the billboards are not commercial advertisements is not barred by res judicata. Plaintiff could not have made such a claim in the earlier proceedings because such an issue was not presented; the state court proceedings were based on plaintiff's commercial advertisements.

C. Rooker-Feldman Doctrine

Plaintiff's remaining claims, as well as his general challenge to the Outdoor Advertising Act, must nonetheless be dismissed under the Rooker-Feldman doctrine. The doctrine provides that federal courts, other than the United States Supreme Court, lack jurisdiction to adjudicate claims seeking review of state court judgments. *See Dubinka v. Judges of the Superior Court,* 23 F.3d 218, 221 (9th Cir. 1994). As the Ninth Circuit recently explained:

> The Rooker-Feldman doctrine recognizes that federal district courts generally lack subject matter jurisdiction to review state court judgments. The doctrine also precludes a federal district court from exercising jurisdiction over general constitutional challenges that are "inextricably intertwined" with claims asserted in state court. A claim is inextricably intertwined with a state court judgment if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it," or if "the relief requested in the federal action would effectively reverse the state court decision or void its ruling."

Fontana Empire Center, LLC v. City of Fontana, 307 F.3d 987, 992 (9th Cir. 2002).

Plaintiff's challenge to the constitutionality of the Outdoor Advertising Act's prohibition on billboard advertising along landscaped freeways is "inextricably intertwined" with the state court judgment. The

state court issued a permanent injunction enjoining plaintiff from displaying billboard advertising at his Redwood City property that does not, among other things, advertise activities not conducted on plaintiff's premises. An order from the Court declaring that the Outdoor Advertising Act cannot be enforced is an order that the state court injunction cannot be enforced against plaintiff; indeed, the complaint specifically seeks an order enjoining enforcement of the state court judgment. The Rooker-Feldman doctrine is thus an additional reason for dismissal of plaintiff's challenge to the Act's prohibition on off-site outdoor advertising along a landscaped freeway.

The doctrine also bars plaintiff's claim that the Act is unconstitutional as applied to plaintiff's current billboard advertisements.[1] Plaintiff's claim is premised on the assumption that Caltrans believes plaintiff's current advertisements violate the Outdoor Advertising Act. At oral argument, in response to a question from the Court regarding standing, plaintiff stated that the State had sent plaintiff a notice advising that his current advertisements violate the

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[1] At oral argument on November 15, 2002, plaintiff's counsel explained that the advertisements identified in the complaint are not currently being displayed, instead, plaintiff has put up political advertisements, including a sign advertising Bill Simon for California Governor. Counsel represented, however, that his client intends to immediately resume the advertisements identified in the complaint. Based on that representation, the Court concludes that plaintiff's as-applied challenge is not moot.

court injunction. If the state court finds plaintiff in contempt for his current signs, however, an order from this Court declaring that the Act as applied to these signs is unconstitutional and cannot be enforced would, in effect, reverse the state court's finding of contempt and thus be barred by the Rooker-Feldman doctrine. If on the other hand, the state court finds that plaintiff's signs do not violate the Act and therefore do not violate the state court injunction, then the Act has not been applied to plaintiff's current advertisements and there is no case or controversy. In other words, plaintiff's constitutional challenge with respect to his current billboard advertisements is not ripe.

In his supplemental memorandum plaintiff contends that his current signs do not violate the Act because they do not constitute commercial advertising. Such a claim, however, is not a claim that the statute as applied to him violates the United States Constitution; rather, it is simply a claim that his conduct does not violate state law. This Court declines to exercise supplemental jurisdiction of such a state law claim. The state court that issued the injunction is in the best position to determine if plaintiff's current signs violate the Act and the injunction.

CONCLUSION

In 1999 a California state court enjoined plaintiff from displaying billboard advertisements that violate

California's Outdoor Advertising Act. A California Court of Appeal affirmed and the California Supreme Court denied review. The state court has twice found plaintiff in contempt of that order. Despite plaintiff's plea to the contrary, this action is nothing more than a belated attempt to reverse the state court's permanent injunction or, at best, to obtain a declaration from this Court that plaintiff's current signs do not violate the injunction. The Court cannot and, even if it could, will not exercise its jurisdiction over either of these claims. Accordingly, plaintiff's complaint is dismissed without prejudice.

IT IS SO ORDERED.

Dated: November 27, 2002

/s/
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NANO MALDONADO, Plaintiff, v. WILL KEMPTON, in his capacity as Director of the California Department of Transportation, Defendant.	Case Number: C02-3167 CRB **STIPULATED MOTION FOR ORDER RE COSTS AND ATTORNEY'S FEES**

I. MOTION

Upon the stipulation of the parties filed herein concurrently herewith, it is hereby requested that the Court issue an order awarding plaintiff Nano Maldonado $1,494.62 for costs of suit, and $277,792.50 for attorney's fees consistent with all terms set forth in said stipulation.

Dated: March 6, 2007 By: *ss/* _____
Dennis Zell

[UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IT IS SO ORDERED

/s/ Charles R. Breyer
Judge Charles R. Breyer

March 8, 2007]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANO MALDONADO, Plaintiff-Appellant, v. JEFF MORALES, in his capacity as Director of the California Department of Transportation, Defendant, and WILL KEMPTON, in his capacity as Director of the California Department of Transportation, Defendant-Appellee.	No. 06-15657 D.C. No. CV-02-03167-CRB Northern District of California, San Francisco ORDER (Filed May 17, 2007)
NANO MALDONADO, Plaintiff-Appellant, v. WILL KEMPTON, in his capacity as Director of the California Department of Transportation, Defendant-Appellee.	No. 07-15535 D.C. No. CV-02-03167-CRB Northern District of California, San Francisco ORDER

These appeals are consolidated.

The briefing schedule previously set by the court in Appeal No. 07-15535 shall govern these appeals.

An in-person mediation will be held on June 11, 2007, at 10:30 a.m., at the U.S. District Court, 501 "I" Street, Sacramento, California [telephone 916-491-3913 – for direction inquiry only].

Unless excused by the Circuit Mediator prior to the scheduled conference, the following participants shall attend on behalf of appellant: Dennis Zell, Esq. and Nano Maldonado.

Unless excused by the Circuit Mediator prior to the scheduled conference, the following participants shall attend on behalf of appellee: Ron Beals, Esq. and Mike Bauer.

Participants should plan to spend the entire day engaged in meaningful settlement discussions and come prepared with thoughtful solutions to this dispute.

FOR THE COURT

/s/ Pete Sherwood
Peter W. Sherwood
Circuit Mediator

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANO MALDONADO, Plaintiff-Appellant, v. JEFF MORALES, in his capacity as Director of the California Department of Transportation, Defendant, and WILL KEMPTON, in his capacity as Director of the California Department of Transportation, Defendant-Appellee.	No. 06-15657 D.C. No. CV-02-03167-CRB Northern District of California, San Francisco ORDER (Filed Jun. 24, 2009)

NANO MALDONADO, Plaintiff-Appellant, v. WILL KEMPTON, in his capacity as Director of the California Department of Transportation, Defendant-Appellee.	No. 07-15535 D.C. No. CV-02-03167-CRB Northern District of California, San Francisco ORDER

Before: McKEOWN and CALLAHAN, and SILER, Circuit Judges.*

All judges vote to deny the petition for panel rehearing. Judges McKeown and Callahan vote to deny the petition for rehearing en banc and Judge Siler so recommends.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

RELEVANT EXCERPTS OF LAW

United States Constitution:

Free Speech & Press Clauses

1st Amendment Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Privileges & Immunities, Due Process & Equal Protection Clauses

14th Amendment [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Business & Professions Code – Division III (Professions and Vocations Generally) – Chapter 2 (Advertisers):

Article 3 (Application of Chapter)

General Exemption for Noncommercial Speech (2008 Amendment):

§ 5275 Notwithstanding any other provision of this chapter, the director may not regulate noncommercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter.

Article 8 (Landscaped Freeways)

Landscaped Freeway Ban:

§ 5440 Except as otherwise provided in this article, no advertising display may be placed or maintained on property adjacent to a section of a freeway that has been landscaped if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway.

Specific Exemptions to Landscaped Freeway Ban:

§ 5442 Section 5440 does not apply to any advertising structure or sign if the advertising display is used exclusively for any of the following purposes:

(a) To advertise the sale or lease of the property upon which the advertising display is placed.

(b) To designate the name of the owner or occupant of the premises upon which the advertising display is placed, or to identify the premises.

(c) To advertise goods manufactured or produced, or services rendered, on the

property upon which the advertising display is placed.

3 Year Grace Period Following "Landscaped" Designation:

§ 5441 Any advertising display which is now, or hereafter becomes, in violation of Section 5440 shall be subject to removal three years from the date the freeway has been declared a landscaped freeway by the director or the director's designee and the character of the freeway has been changed from a freeway to a landscaped freeway.

Article 9 (Crimes & Penalties)

Nuisance Per Se:

§ 5461 All advertising displays which are placed or which exist in violation of the provisions of this chapter are public nuisances and may be removed by any public employee as further provided in this chapter.

Strict Criminal Liability:

§ 5464 Every person as principal, agent or employee, violating any of the provisions of this chapter is guilty of a misdemeanor.

Article 1 (General Provisions)

Relevant Definitions:

§ 5202 "Advertising display" refers to advertising structures and to signs.

§ 5203 "Advertising structure" means a structure of any kind or character erected, used, or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed, including statuary, for advertising purposes.

"Advertising structure" does not include:

(a) Official notices issued by any court or public body or officer;

(b) Notices posted by any public officer in performance of a public duty or by any person in giving legal notice;

(c) Directional, warning or information structures required by or authorized by law or by federal, state or county authority.

(d) A structure erected near a city or county boundary, which contains the name of such city or county and the names of, or any other information regarding, civic, fraternal or religious organizations located therein.

§ 5221 "Sign" refers to any card, cloth, paper, metal, painted or wooden sign of any character placed for outdoor advertising purposes on or to the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned, other than an advertising structure.

"Sign" does not include any of the following:

(a) Official notices issued by any court or public body or officer.

(b) Notices posted by any public officer in performance of a public duty or by any person in giving any legal notice.

(c) Directional warning or information signs or structures required by or authorized by law or by federal, state or county authority.

(d) A sign erected near a city or county boundary that contains the name of that city or county and the names of, or any other information regarding, civic, fraternal, or religious organizations located within that city or county.

§ 5212 "Freeway," for the purposes of this chapter only, means a divided arterial highway for through traffic with full control of access and with grade separations at intersections.

§ 5216 (a) "Landscaped freeway" means a section or sections of a freeway that is now, or hereafter may be, improved by the planting at least on one side or on the median of the freeway right-of-way of lawns, trees, shrubs, flowers, or other ornamental vegetation requiring reasonable maintenance.

(b) Planting for the purpose of soil erosion control, traffic safety requirements, including light screening, reduction of fire hazards, or traffic noise abatement, shall not change the character of a freeway to a landscaped freeway.

(c) Notwithstanding subdivision (a), if an agreement to relocate advertising displays from within one area of a city or county to an area adjacent to a freeway right-of-way has been entered into between a city or county and the owner of an advertising display, then a "landscaped freeway" shall not include the median of a freeway right-of-way.

§ 5225 The verb, "to place" and any of its variants, as applied to advertising displays, includes the maintaining and the erecting, constructing, posting, painting, printing, tacking, nailing, gluing, sticking, carving or otherwise fastening, affixing or making visible any advertising display on or to the ground or any tree, bush, rock, fence, post, wall, building, structure or thing. It does not include any of the foregoing activities when performed incident to the change of an advertising message or customary maintenance of the advertising display.

Supreme Court, U.S.
FILED
DEC 16 2009
OFFICE OF THE CLERK

No. 09-359

In The
Supreme Court of the United States

NANO MALDONADO, AN INDIVIDUAL,

Petitioner,

v.

RANDELL IWASAKI, IN HIS CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Attorneys for Respondent, RANDELL IWASAKI, as Director of the State of California Department of Transportation

QUESTIONS PRESENTED
(As Presented by the Petitioner)

1. Is the legal distinction between commercial and noncommercial speech so vague, overbroad, and arbitrary that it violates Due Process and abridges the Freedoms of Speech and Press?

2. Is the commercial-noncommercial distinction overbroad as to billboards under the fourth prong of the *Central Hudson* test? What legal standards should be used to evaluate injunctions and equal protection claims involving a commercial-noncommercial distinction [on billboard copy]?

3. In the context of billboards, does an offsite commercial speech restriction materially advance æsthetic and traffic safety interests as a matter of law, or must the government submit substantial evidence to prove the law is effective, both in the aggregate and as-applied to the particular billboard?

PARTIES

Respondent Director Randell Iwasaki is the Director of the California Department of Transportation, informally referred to as "Caltrans." The Department is an agency of the sovereign state of California created pursuant to California Government Code sections 14000 *et seq.* and statutorily entrusted with enforcing the California Outdoor Advertising Act. Cal. Bus & Prof. C. § 5250. Section 5419 of the Act obligates the Director to provide for effective control of outdoor advertising as defined in 23 U.S.C. 131 (the "Highway Beautification Act", or HBA). The only potential pecuniary interest the Department has with respect to the control of outdoor advertising is the collection of an annual permit fee when an outdoor advertising permit is issued, but that fee is statutorily limited to the recovery of costs, not to exceed $100. (Cal. Bus. & Prof. C. § 5485 (a)(2)).

Petitioner Nano Maldonado is an individual.

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Maldonado v. Kempton, 422 F.Supp.2d 1169 (N.D. Cal. 2006);

Kempton v. Maldonado, 544 U.S. 968 (2005) (denying certiorari);

Maldonado v. Harris, 370 F. 3d 945 (9th Cir. 2004).

The Petition lists virtually every order and opinion since this matter moved to the federal courts.

JURISDICTION

The Decision of the Ninth Circuit was entered on February 25, 2009. Petitioner's petitions for rehearing were denied on June 24, 2009. The Petition for Writ of Certiorari was filed on September 22, 2009. Respondent had originally waived the right to file a response; however, on November 16, 2009, the Clerk of the Court requested that Respondent file this response.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1), which provides that cases and decisions in the courts of appeals may be reviewed by the Supreme Court by a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the First and Fourteenth Amendments to the U.S. Constitution are involved.

The California Outdoor Advertising Act (Cal. Bus. & Prof. C. §§ 5200 *et seq.*) is also involved.

STATEMENT OF THE CASE

Beginning in 1956, and for decades thereafter, the billboard at issue was used as an onsite advertising structure for Granny Goose Potato Chips, which were produced in the building upon which the billboard is located. No outdoor advertising permit was required for onsite displays at the time of its construction, nor is one presently required under the California Outdoor Advertising Act so long as the copy is for onsite goods or services. The warehouse and display are in Redwood City, California, adjacent to U.S. Highway 101, a properly designated "landscaped freeway." (Cal. Bus. & Prof. C. § 5216).

In 1965, Congress enacted the Highway Beautification Act, codified at 23 U.S.C. 131. Shortly thereafter, in 1967, California revised the California Outdoor Advertising Act, originally enacted in 1939, to provide that "no advertising display may be placed or maintained on property adjacent to" a landscaped freeway "if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway." (Cal. Bus.

& Prof. C. § 5440). The Act enumerated exceptions to the landscaped freeway ban in section 5442 and expressly allowed for onsite advertising. (Cal. Bus. & Prof. C. § 5442(c)). The Act also "grandfathered" lawfully erected offsite advertising displays. (Cal. Bus. & Prof. C. § 5216.1). Contrary to Petitioner's unsupported assertion[1], California enforces the ban on offsite commercial advertising according to law, including within the "same zone" as the subject display. While the Petition does not expressly implicate the HBA, it should be noted that the California state standards (e.g., the onsite/offsite distinctions) challenged here are virtually identical to the relevant sections of the HBA – and for that matter, the relevant sections of every state of the Union save one.

Approximately a quarter of a century after the pertinent revisions to the Act, and the concomitant issuance of regulations, Petitioner Nano Maldonado purchased the warehouse and its rooftop display which had never had an outdoor advertising permit for offsite copy. In 1993, Maldonado applied to the California Department of Transportation for an outdoor advertising permit in accordance with the procedures set forth in the Act. (Cal. Bus. & Prof. C. §§ 5350 *et seq.*) Notwithstanding the fact that the application was properly denied, Maldonado nevertheless "continued using the billboard for offsite

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[1] "Worse yet, the government admittedly does not enforce the ban against others in the same zone." Petition at p. 8. Please see Petitioner's App. 49 and following (from an order from the district court below) for an explanation of the "grandfathering" of signs, all of which had lawful offsite permits, within the same segment of landscaped freeway.

advertising despite numerous citations." (*Maldonado v. Morales*, 566 F.3d 1037 (9th Cir. 2009) Petitioner's App. 4).

Maldonado's attempt to fabricate qualifying "onsite" businesses -- by requiring that would-be advertisers on the billboard lease office space in the building (the office space was never actually used) along with the billboard -- was soundly rejected by a California state appellate court. *People ex rel. Dep't of Transport. v. Maldonado*, 86 Cal.App.4th 1225 (2001) ("*Maldonado I*"). Undeterred by the decisions of the state trial and appellate courts, Maldonado continued his offsite advertising and was twice found by California state courts to have violated the injunction.

Maldonado then moved to the federal forum and challenged the constitutionality of the entire California Outdoor Advertising Act, both facially and as-applied. The district court found that the COAA failed to satisfy First Amendment standards solely because it did not explicitly allow noncommercial speech wherever any commercial speech was permitted (*Maldonado v. Kempton*, 422 F.Supp.2d 1169, 1176 (N.D. Cal. 2006) ("*Maldonado III*")). Although facially unconstitutional, the district court found that the Act was constitutional as applied because there was no showing that any noncommercial speech had ever been impermissibly denied.[2] The district court therefore ordered a

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[2] In the state court proceedings involving Appellant, there was an issue whether particular copy qualified as "noncommercial," but there was never an issue whether noncommercial copy

measured series of corrective steps to insure that California's long-standing policy of allowing noncommercial messages was continued, codified, and publicly known (*Maldonado III* at 1178-79). On July 17, 2006, California promulgated an emergency regulation (which took effect immediately) to expressly exempt noncommercial messages from the Act's prohibitions. (California Code of Regulations, Title 4, section 2240(e)). In April 2007, Senate Bill 715 added Business and Professions Code § 5275. The section, signed by the Governor in July 2007, effective January 1, 2008, provides that:

> "Notwithstanding any other provision of this chapter, the director may not regulate noncommercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter."

California's immediate regulatory and legislative correction cured the only constitutional defect identified by the Honorable Judge Breyer. Petitioner now challenges the COAA and the regulatory and statutory amendments under the First and Fourteenth Amendments, seeking what amounts to a *de novo* review of many questions that are now or always were moot. Beyond challenging the Ninth Circuit decision, Petitioner primarily expresses his desire to abolish the Commercial Speech Doctrine (Petition at p. 44) and obliterate of

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could be placed on the display. See *Department of Transportation v. Maldonado* ("*Maldonado I*") (2001) 86 Cal.App.4th 1225, 104 Cal.Rptr. 2d 66).

all federal and state laws regarding outdoor advertising. Such a course of action would be ill-advised and unnecessary, and the Petition is an inappropriate vehicle by which to seek it.

ARGUMENT/REASONS FOR DENYING THE PETITION

In his effort to portray this case as one worthy of review by this Court, Maldonado takes liberties with the factual record, misrepresents or ignores the statutory scheme he purports to challenge (Rule 10), elevates distinctions without differences into inter-circuit splits, confuses the First Amendment's coverage with the scope of its protection, and grafts disparate constitutional doctrines together. The constitutional chimera he creates is not a viable one, however, because each of the constituent doctrines he interprets is well-settled, particularly as to outdoor advertising displays.

Maldonado's first principle is that the distinction between commercial and noncommercial speech should be unlawful, notwithstanding the fact that this Court has always accorded noncommercial speech greater protection under the ægis of the First Amendment. If one accepts his contention "that the commercial-noncommercial distinction is arbitrary," it necessarily follows that this Court must overrule every prior decision on that point, including *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Petitioner compounds the problem by not restricting himself to advocating the wholesale reversal of governing First Amendment jurisprudence. Perhaps

in tacit recognition that his case presents no novel issue or split in circuit authority for this Court's consideration, Maldonado unnecessarily adds Due Process and Equal Protection claims into the mix.

At the same time, he conflates the long-standing commercial-noncommercial distinction with the general ban on commercial speech within a narrowly designated space (adjacent to, and visible from, specified segments of highway) and its very limited exception for onsite commercial copy, essentially arguing that the exception must invalidate the rule codified in the Highway Beautification Act at 23 U.S.C. 131(c)(3) and by 49 states and the Commonwealth of Puerto Rico. By so doing, he seeks to overrule the core holding of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

The plurality in *Metromedia* recognized the challenge "of applying the broad principles of the *First Amendment* to unique forums of expression." *Id.* at 500. The general four-part test[3] announced in *Central Hudson* was therefore applied to the specific medium of *billboards* with express attention devoted to the offsite exception which Maldonado now presents to the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding

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[3] (1) The *First Amendment* protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977), citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). In *Metromedia*, those narrowest grounds include the holding that the onsite exception does not render the general ban on commercial billboards impermissible. The prescriptive reach of *Metromedia* with respect to political signs, mass market mailings, street furniture,[4] news racks, and other media may be in doubt, but there is no question that it upheld the onsite exception for billboards as passing constitutional muster. As such, the instant Petition raises no question worthy of the Court's attention.

In the years since *Central Hudson* and *Metromedia* were decided, this Court has revisited and expounded on certain facets of the four-part test, but it has never expressly or implicitly overruled either. All of the cases cited by Petitioner may be read as in harmony with – not in opposition to – *Metromedia*.

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[4] As noted in correspondence from the Petitioner on November 5, 2009, the Court recently considered whether or not to grant *certiorari* in the case of *Metro Lights, L.L.C. v. City of Los Angeles*, No. 09-259. *Cert.* denied, Dec. 14, 2009. Although Petitioner claims that *Metro Lights* raised "a legal issue that is identical to one of the issues raised [here]," namely the continued vitality of *Metromedia*, the legal question posed is distinct. At issue in *Metro Lights* was whether or not the law of the Ninth Circuit had properly applied *Metromedia* to offsite advertising copy on street furniture. The instant case presents no teleological extension; it falls squarely within *Metromedia*.

The first question presented[5] by Maldonado is whether or not "the legal distinction between commercial and noncommercial speech [is] so vague, overbroad, and arbitrary that it violates Due Process and [unconstitutionally] abridges the Freedom of Speech and Press." Since both the Due Process Clause and the First Amendment involve distinct lines of jurisprudence (as do vagueness, overbreadth, and arbitrariness), they will be considered separately, though the former will receive lesser exploration, following Petitioner's lead. None of the issues raised by Petitioner's pregnant first question implicate an area of the law that requires clarification of any kind.

Petitioner's second question [sic] presented is 1) whether or not an unidentified decision regarding overbreadth and newsracks is binding as to billboards and 2) what legal standards should be used to evaluate injunctions and equal protection claims involving a commercial-noncommercial distinction. Assuming that the former question refers to *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1992), the question is answered in *Cincinnati* itself at fn. 20: "*Metromedia* ... is not to the contrary.... Unlike this case, which involves discrimination between commercial and noncommercial speech, the 'offsite-onsite' distinction

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[5] Petitioner erroneously asserts that "the California Outdoor Advertising Act prohibits offsite commercial advertising." (Petition, p. i). "The COAA does not ban all signs, or even nearly all signs, but only off premises, commercial billboards. Maldonado remains free to post any non-commercial messages or to post onsite advertising on his billboard." *Maldonado IV* at 1046.

involved disparate treatment of two types of commercial speech." The progeny of *Central Hudson* should be read in harmony, not in conflict. The latter question does not seem conceptually related to the first, nor does Petitioner elaborate the decisional law regarding injunctions or Equal Protection. It is worth noting in passing, however, that the injunction simply enjoined Maldonado from displaying off-premise copy on his billboard and that none of the lower courts found that Maldonado had established a basis for invoking Equal Protection.

Petitioner's last question presented asks if "an offsite commercial speech restriction materially advance[s] aesthetic and safety interests as a matter of law, or must the government submit substantial evidence to prove the law is effective, both in the aggregate and as-applied to the particular billboard?" *Metromedia* answered affirmatively at 510-12; Justice Stevens, dissenting in part at 541, Chief Justice Burger, dissenting at 560, Justice Rehnquist, dissenting at 570.

I. THE LEGAL DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH DOES NOT VIOLATE DUE PROCESS.

Maldonado has styled his Petition, *inter alia*, as a Due Process challenge. Given the extraordinary number of administrative, state, and federal fora that have reviewed the advertising copy on Mr. Maldonado's unpermitted outdoor advertising display, and because he articulates no procedural shortcomings, he must refer to substantive due process even though the authority he cites is almost

all First Amendment jurisprudence. The thrust of Maldonado's argument seems to be that the commercial-noncommercial distinction itself is so inherently vague and arbitrary that it violates substantive Due Process.

A. There is no conflict among the circuits regarding the well-settled commercial-noncommercial distinction that justifies granting the Petition.

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.... the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.
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> *Ohralik v. Ohio State Bar Assn.* 436 U.S. 447, 456 (1978)

In section I[6]. C. of his petition, Maldonado contends that the Ninth Circuit has decided an important question of federal law -- that the distinction between commercial and noncommercial speech does not deny Due Process -- in a way that conflicts with other circuit courts and the California Supreme Court. None of the cases cited in support of his Petition, however, reach a contrary conclusion. In fact, this Court in *Central Hudson* confirmed a lower standard of constitutional protection for commercial speech.

1. No Circuit or other court has found that the commercial-noncommercial distinction is unconstitutionally vague such that it violates Due Process.

> *Condemned to the use of words, we can never expect mathematical certainty in our language.*
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> *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)

According to Maldonado, the Ninth, Fourth, Seventh and Tenth Circuits have all rejected vagueness challenges to the commercial-noncommercial distinction, albeit on different grounds.

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[6] The Petition states (p. 8): "THIS COURT SHOULD REVIEW WHETHER THE COMMERCIAL-NONCOMMERCIAL DISTINCTION VIOLATES DUE PROCESS"

Far from creating a "lack of predictability," however, every analytical approach -- from the "Dual Analysis" of *Outdoor Systems Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993) through the "Economic Interests" of *Major Media of the Southeast v. City of Raleigh* 792 F.2d 1269, 1273 (4th Cir. 1986), the "Fundamental Purpose" of *Lavey v. City of Two Rivers*, 171 F.3d 110, 116 (7th Cir. 1999), and the "Multi-Factor" of *National Advertising Co. v. City and County of Denver*, 912 F.2d 405, 410 (10th Cir. 1990) -- yields a uniform result: The commercial-noncommercial distinction survives the scrutiny of a constitutional vagueness challenge. Maldonado fails to show a circuit split because he cannot identify a single opinion from any jurisdiction that finds the commercial-noncommercial distinction unconstitutionally vague.

When all judicial roads lead to Rome, the conflict is illusory. It is also worth noting that Maldonado -- although asking this Court to elect a uniform, procrustean approach from among several adopted by the various circuits -- advocates overruling them all.

Contrary to the Petitioner's assertion, the Ninth Circuit did not rule that "the standards articulated by this Court violate Due Process" (Petition at p. 28) for a lack of audacity, but rather because of *stare decisis*, the unequivocal guidance of this Court, and because it has no authority whatsoever to find that binding Supreme Court precedent violates constitutional principles.

While in many instances there may be a clear distinction between procedural and substantive due process claims, an overlap can exist. See *Santosky v. Kramer*, 455 U.S. 745, 747-748 (1982), (requiring the government to meet heightened procedural requirements before terminating parental rights because such rights are fundamental). Where a person is seeking to have a government action declared unconstitutional as violating a constitutional right, then substantive due process is involved. If a person seeks to have a government action declared unconstitutional because of the lack of adequate safeguards, then procedural due process is in issue. In this case, the Petitioner raises both procedural and substantive due process claims; the argument that there is not a clear standard being the procedural claim, and the alleged violation of his rights as the substantive claim. See Writ of Petition, 32. Therefore both are separately addressed below.

Under Procedural Due Process, laws and regulations have been struck down as unconstitutional when they have been too vague or indefinite to provide adequate guidance to would be law-abiding citizens, enforcement officials, or courts. *Pope v. Illinois*, 481 U.S. 497, 515 (1987); *Winters v. New York*, 333 U.S. 507, 509-510 (1948). The doctrine of vagueness incorporates notions of fair notice or warning by requiring that the law provide a man of average intelligence with a reasonable understanding of what contemplated conduct is proscribed. *United States v. Mazurie*, 419 U.S. 544, 553 (1975).

The regulatory scheme of the California Outdoor Advertising Act is not vague, and the Petitioner does not challenge it as such. The COAA bans the use of Petitioner's billboard for offsite commercial advertisements. Cal. Bus. & Prof. C. §§ 5440 & 5216.1. The Act expressly allows onsite commercial advertising and non-commercial speech. Cal. Bus. & Prof. C. §§ 5442(c) & 5275. Unable to mount any credible due process attack on the COAA, the Petitioner has morphed his displeasure with this Court's jurisprudence regarding the commercial-noncommercial distinction in First Amendment cases into a Due Process argument. Respondents urge the Court to steer clear of this misguided and confusing line of argument in an area of law that is already cumbersome.

Substantive Due Process, as applied to the states, is derived from the Fourteenth Amendment's prohibition against a state depriving "any person of life, liberty, or property without the due process of law." U.S. Const. amend. XIV, § 1. The doctrine allows for the incorporation of provisions from the Bill of Rights that are deemed fundamental and to protect these rights from infringement by the states. *Gitlow v. New York*, 268 U.S. 652 (1952). In relevant part, these rights include the First Amendment's freedom of speech. *Id.* Incorporation of a right under Due Process however, does not alter the level of scrutiny normally associated with the right.

While the Petitioner may be justified in invoking Due Process, in the limited sense that it is the Due Process clause of the Fourteenth Amendment that applies the protections of the First

Amendment to the states, this is in substance a freedom of speech case. Thus, this Court's jurisprudence in the area of freedom of speech along with its applicable level of scrutiny controls this case.

2. No Circuit has found that the commercial-noncommercial distinction is unconstitutionally overbroad as applied to outdoor advertising displays.

One of the salient features of the four-part *Central Hudson* analysis is that the medium matters. As this Court noted in *Metromedia* at 501: "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method. We deal here with the law of billboards", (paraphrasing Justice Jackson in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Far from being an empty "talismanic phrase", as Petitioner attempts to dismiss such distinctions (Petition at pp. 43-44), the notion that the medium matters is the bedrock of the constitutional analysis. This Court has always treated different media with unique characteristics differently and has clearly articulated the reasons for those differences.

The decisions in *Cincinnati* and *Metromedia* are complementary, not contradictory because they both follow the tenets of the *Central Hudson* framework. This conclusion is supported by the procedural history of *Cincinnati*. The Sixth Circuit found no controlling opinion in *Metromedia*. *Discovery Network, Inc. v. City of Cincinnati*, 946

F.2d 464, 470 n. 9. Rather than affirm that interpretation, this Court explained that:

> *Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)*, upon which the city heavily relies, is not to the contrary. In that case, a plurality of the Court found as a permissible restriction on commercial speech a city ordinance that, for the most part, banned outdoor 'offsite' advertising billboards, but permitted 'onsite' advertising signs identifying the owner of the premises and the goods sold or manufactured on the site. *Id., at 494, 503.* Unlike this case, which involves discrimination between commercial and noncommercial speech, the 'offsite-onsite' distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations; moreover, the plurality concluded that a 'city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising,' *id., at 511-512.* Neither of these bases has any application to the disparate treatment of newsracks in this case.
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> *Cincinnati* 507 U.S. 410 at 425, fn. 20 (1993).

Maldonado urges that *Cincinnati* implicitly overrules *Metromedia* when the cases should be read in harmony.

Petitioner relies on *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999), *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Cir. 1994), and *Solantic LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) for an alleged split in authority on the commercial-noncommercial distinction as overbroad.

The *obiter dicta* in *Lavey* is not persuasive. Not only did that court decline to rule on the subject, it simply expressed a concern that underinclusivity may be an issue absent "sufficient evidence of a fit between the [commercial-noncommercial] distinction and the city's safety and aesthetics goals exists." *Lavey* 171 F.3d at 1115, fn 16. In *Cincinnati*, the "fit" was egregious because the ordinance was tailored in such a fashion that it would require "the removal of 62 newsracks while about 1,500 to 2000 [would] remain in place." *Cincinnati*, 507 U.S. 410 at 418. It is also worth noting that the *Lavey* court found that "the ordinance is 'carefully-crafted' to meet the safety and aesthetic goals in articulates." *Lavey*, 171 F.3d at 1115.

In *Rappa*, the court analyzed *Metromedia* in the context of political signs and was "unable to derive a governing standard" for that purpose. With respect to commercial billboards, it concluded that "the plurality opinion indicated that content-based distinctions within the category of commercial speech were permissible" and interpreted "the *Metromedia* plurality to have been concerned with the fact that the San Diego ordinance allowed a broad type of commercial speech (onsite speech) while not allowing non-commercial speech. . . . That concern is not

implicated here given our interpretation of the statute to allow commercial and non-commercial onsite speech." *Rappa*, 18 F.3d at 1055, 1056.

The difficulty arose from a different part "of the plurality's ruling – that distinctions within the category of non-commercial speech must be supported by a compelling state interest." *Id* at 1056. The decision does not convey the analytical agony over the commercial-noncommercial distinction which Maldonado imparts to it. Then-Circuit Judge Alito's concurrence is noteworthy not only for its call for clarification regarding the on-site exception, but also because it opines that one chapter of the challenged ordinance "has a very limited geographical reach, applying only to areas adjacent to the interstate and primary highway system" and should therefore survive "the test for a content-neutral time, place, and manner restriction." *Id* at 1080.

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005), as noted by Petitioner, adopts the *Metromedia* plurality's reasoning. Even if the Eleventh Circuit's *Marks* analysis concludes that *Metromedia* is not binding, the practical effect is that it is still the law of the circuit which hardly yields a circuit split.

B. No state-federal conflict on the commercial-noncommercial distinction exists.

Petitioner's contention regarding the existence of a federal-state conflict is also unfounded.

Contrary to Petitioner's characterization, *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 960 (2002), *cert. dism.*, 539 U.S. 654 (2003), did not introduce a new "Who is Speaking?" test "for making the commercial-noncommercial distinction." (Petition at p. 30). Apart from Petitioner's dubious nomenclature, which emphasizes the first element of a tripartite process, the case stands only for the proposition "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." *Nike*, 27 Cal.4th at 946. "[The California Supreme Court] has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech." (Emphasis in original.). *Id.* at 959.

Nike merely concludes that California's Unfair Competition Law (Cal. Bus. & Prof. C. §§ 17200 *et seq.*) passes muster under both the U.S. and the California Constitutions. The California Supreme Court expressly stated that its limited-purpose test is not for general application:

> The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment, nor has this court adopted such a test under the state Constitution, nor do we propose to do so here.... We conclude, therefore, that *when a court must decide whether particular speech may be subjected to laws aimed at*

> *preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or non-commercial speech requires consideration of three elements, the speaker, the intended audience, and the content of the message. (Italics in original).

Nike, 27 Cal.4th at 960.

Petitioner is correct that *Nike* is binding in California state court, but incorrectly represents its "limited purpose" test as having broad application. The holding in *Nike* is easily reconciled with the apposite line of cases which hold that the states are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. *Friedman v. Rogers*, 440 U.S. 1 (1970); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985).

Stripped of the commentary and questionable conclusions[7] drawn from disparate lines of free

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[7] See e.g. the second "Rule" derived under the "Common Sense" cases, which misstates the ratio decidendi of the cases which were decided on the grounds that the government could not completely suppress the advertising of lawful products and did not address the level of scrutiny. Virginia Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 (1976): "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information...." and "Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this [] statute, which singles out speech of a particular content and seeks to prevent its dissemination

speech cases, the gravamen of the Petition is that First Amendment jurisprudence is in disarray with respect to outdoor advertising displays because of the complex decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the doctrinal confusion of which is exacerbated by *Cincinnati* and other subsequent cases. A cursory examination of *Metromedia* demonstrates that no such jurisprudential disarray exists.

C. *Metromedia* provides a dispositive rule regarding onsite-offsite advertising copy which does not require clarification.

Maldonado's Petition reveals that the true thrust of his challenge deals not with the commercial-noncommercial distinction, but rather to the limited onsite exemption. As he frames the alleged constitutional issue, he cannot place *offsite* "truthful, non-misleading advertisements about lawful products and services on his own legally built [onsite] billboard structure." (Petition at p. 8, first full paragraph.).

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completely." Id. at 770. See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S 85, 96 (1977) "The constitutional defect ... is far more basic. The Township Council here, like the Virginia Assembly in Virginia Pharmacy Board, acted to prevent its residents from obtaining certain information" and Carey v. Population Services International, 431 U.S. 678, 700 (1977) "the statute challenged here seeks to suppress completely any information about the availability and price of contraceptives."

Petitioner Maldonado conflates and confuses the commercial-noncommercial and onsite-offsite distinctions in his treatment of the *Metromedia* decision. Contrary to Petitioner's hyperbolic claim, the different treatment accorded the two categories of commercial speech is not "doctrinally convoluted, distressingly bewildering to practitioners and judges, and hopelessly confusing to lay people." (Petition at p. 9). It is well-settled. The instant case treads no ground that has not been covered by *Central Hudson*, *Metromedia*, *Cincinnati*, and their progeny.

Although the *Metromedia* decision has generated some scholarly debate regarding its reach, the instant controversy as framed by Petitioner is easily resolved by the unambiguous portion regarding the distinction between onsite and offsite copy under the *Central Hudson* test. As noted in *Rappa v. New Castle County*, 18 F.3d 1043, 1055 (3rd Cir. 1994) "the plurality concluded that the statute's content-based distinctions within the category of commercial speech -- between onsite and offsite commercial advertising, and between "for sale" signs and other signs did not undercut the city's argument that the ordinance directly advanced its aesthetic and safety interests." *Rappa* at 1055, citing *Metromedia*, 453 U.S. at 511-12. "The plurality's decision as to the regulation of commercial speech was expressly joined by Justice Stevens." *Id.* at 1055, fn 18.

Application of the *Marks* rule makes clear that the instant case falls squarely within the "position taken by those Members who concurred in the

judgment on the narrowest grounds." *Marks*, 430 U.S. 188, 193 (1977).

The billboard specific treatment of the four-part *Central Hudson* test in *Metromedia* is well-settled with respect to the onsite-offsite distinction.

D. Deference should be accorded to the legislative distinction between onsite and offsite commercial advertising, which was introduced in the Highway Beautification Act and mirrored in the codes of 49 states and the Commonwealth of Puerto Rico.

Petitioner's request to eliminate the long-standing legislative distinction between onsite and offsite commercial speech on billboards would effectively repeal critical portions of the Highway Beautification Act codified at 23 U.S.C. 131 and all of its state analogs. Subsection (c)(3) expressly exempts onsite advertising from its general ban,[8] and the basic approach of banning all commercial

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[8] (c) Effective control means that such signs, displays ... visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to ... (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located.

signs then exempting on-premise ones is followed by 49 states and the Commonwealth of Puerto Rico.[9]

First and foremost, the fact that so many jurisdictions have embraced the onsite exemption

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[9] Please see e.g. Code of Ala. § 23-1-273; Alaska Stat. § 19.25.105(a)(2); A.R.S. § 28-7902 A.2.; A.C.A. §§ 27-74-204(b)(2), 27-74-302(3); Cal. Bus. & Prof. C. 5442.5(c); C.R.S. §§ 43-1-401 et seq., esp. 43-1-403(14), 43-1-404(1)(b); Conn. Gen. Stat. § 13a-123 (e)(3); 17 Del. C. §§ 1108(c), 1121(3); Fla. Stat. § 479.16; O.C.G.A. §§ 32-6-72(3), 32-6-73(3); HRS §§ 264-72(3), 445-112(3)(4); Idaho Code §§ 40-1904(3), 40-1911; 225 ILCS 440/4.03, Burns Ind. Code Ann. § 8-23-20-7 (3); Iowa Code § 306C.11 2.; Kansas' Highway Beautification Act of 1972, K.S.A. §§ 68-2231 et seq., esp. 68-2233(c); KRS §§ 177.841(2)(c), 177.863(2)(d); La. R.S. §§ 48:461.2 A(2); Md. Code Ann. § 8-727 (c); 23 M.R.S. § 1914; ALM GL ch. 93D, § 2 (b); MCLS § 252.302(q); Minn. Stat. § 173.08(3); Miss. Code Ann. § 49-23-5(1)(c); § 226.520 (2) R.S.Mo.; Mont. Code Anno., §75-15-111(1)(c); R.R.S. Neb. §§ 39-218, 39-202(2)(c); Nev. Rev. Stat. Ann. § 410.320 3; N.J. Roadside Control and Outdoor Advertising Act, esp. N.J. Stat § 27:5-11 c.; New Hampshire RSA 236:73 III.(c); N.M. Stat. Ann. § 67-12-4 A.(3); NY CLS High § 88 2(c); North Carolina Outdoor Advertising Control Act codified at N.C. Gen Stat. §§ 136-126 et seq.esp. 136.129.1(3); N.D. Cent. Code §§ 24-17-03 3, 24-17-03.1 3; ORC Ann. 5516.06(C); 69 Okl. St. §§ 1273(h)(i), 1274(b); ORS 377.715; 36 P.S. § 2718.104(iii); 9 L.P.R.A. § 51 (q); R.I. Gen. Laws § 24-10.1-3; South Carolina's Highway Advertising Control Act at S.C. Code Ann. §§ 57-25-110 et seq., esp. 57-25-430(a)(6), 57-25-640(a)(6); S.D. Codified Laws § 31-29-63(3), Tenn. Code. Ann. §§ 54-21-103(3), 54-21-107(a)(1); Tex. Transp. Code § 391.031(b)(3); Utah Outdoor Advertising Act, esp. Utah Code Ann. § 72-7-504(1)(c); 10 V.S.A. § 493; Va. Code Ann. § 33.1-355(1); Rev. Code. Wash. (ARCW) §§ 47.42.040(3), 47.42.062(3)(e); W. Va. Code § 17-22-7; Wis. Stat. § 84.30 (3)(c); Wyo. Stat. § 24-10-104(a)(iii). The Oregon Supreme Court is the only high court to invalidate a statutory onsite exception, but it did so under the state constitution. Outdoor Media Dimensions, Inc. v. DOT, 340 Ore. 275 (2006).

argues forcefully against Maldonado's contention that the distinction is arbitrary. The legislative unanimity is also evidence that the values of traffic safety and esthetics are compelling state interests, that a general ban on commercial advertising advances that interest, and that the exceptions are narrowly tailored. Additionally, the fact that the Highway Beautification Act and its state analogs all have survived judicial scrutiny for many decades with a solitary exception show that the law is not at all in disarray as Maldonado claims.

The framework of the legislation, a general ban subject to enumerated exceptions, evinces careful deliberation when balancing First Amendment freedoms with other countervailing rights. The "for sale" and on-premises exceptions reflect that the Congress and legislatures struck a reasonable balance between First Amendment and property rights. An attempt to reconcile competing interests should be upheld unless it produces a manifestly unreasonable "fit." *Metromedia* expressed a preference for deference to legislative solutions (*Metromedia*, 453 U.S. at 511-512), and no subsequent decisions have disturbed that preference.

II. THE LONGSTANDING STANDARDS USED TO EVALUATE INJUNCTIONS AND EQUAL PROTECTION CLAIMS REGARDING THE LEGAL COMMERCIAL-NONCOMMERCIAL DISTINCTION ON BILLBOARD COPY NEED NOT BE REVIEWED.

This Court has consistently ruled that a facial challenge to a legislative act must demonstrate that

no set of circumstances exist under which the act would be valid and that the act must have no plainly legitimate sweep.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987). (Noting a "heavy burden" to demonstrate that an Act is facially unconstitutional.)

The Petition here does not even attempt to demonstrate how any act in question – and in particular the California Outdoor Advertising Act (Cal. Bus. & Prof. C. §§ 5200 *et seq.*) -- is invalid on its face. Despite identifying injunctions as one of the questions presented, Maldonado does not raise the issue elsewhere in the body of the Petition. The only injunction issued simply enjoined him from placing off-premise copy.

Maldonado is not a member of a suspect class and is not similarly situated to sign owners who had legal-nonconforming signs which were grandfathered

at the time the California Outdoor Advertising Act was enacted. Maldonado maintains that the Ninth Circuit incorrectly failed to adhere to the standard of intermediate-intermediate scrutiny set forth in *Madsden v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). In support, Maldonado cites one case for that proposition, *Ackerly Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d. 33 (1st Cir. 1996), but that court chose "to sidestep" the difficult question of "whether the onsite/offsite grandfathering restriction is a content-based restriction that triggers strict scrutiny." *Id.* at 37. The challenged Act is content neutral because it bans all offsite commercial advertising, regardless of content. The limited exception for onsite also does not pertain to content per se, but rather to identifying the property and the goods and services available at that location. Maldonado's prior restraint argument rests on his assumption that all billboard regulation constitutes a violation of the First Amendment.

III. THE PETITION RAISES NO REVIEWABLE ISSUE AS TO HOW OFFSITE COMMERCIAL SPEECH RESTRICTIONS LAWFULLY AND LEGITIMATELY ADVANCE ÆSTHETIC AND TRAFFIC SAFETY INTERESTS.

As stated above, the instant controversy as framed by Petitioner is easily resolved by the unambiguous *Central Hudson* test. As noted in *Rappa v. New Castle County*, 18 F.3d 1043, 1055 (3rd Cir. 1994) "the plurality concluded that the statute's content-based distinctions within the category of commercial speech -- between onsite and offsite

commercial advertising, and between "for sale" signs and other signs did not undercut the city's argument that the ordinance directly advanced its aesthetic and safety interests." *Rappa* at 1055, citing *Metromedia*, 453 U.S. at 511-12. "The plurality's decision as to the regulation of commercial speech was expressly joined by Justice Stevens." *Id.* at 1055, fn 18.

> The plurality first holds that a total prohibition of the use of 'outdoor advertising display signs' for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between onsite and offsite commercial signs, [citation omitted], and I therefore join Parts I through IV of JUSTICE WHITE's opinion.

Metromedia, 453 U.S. at 541, Justice Stevens, dissenting in part.

The billboard specific treatment of the four-part *Central Hudson* test in *Metromedia* is well-settled with respect to the onsite-offsite distinction which was narrowly tailored by Congress in the Highway Beautification Act of 1965. No review of the instant case is required or desirable.

Petitioner's treatment of this issue is nothing more than a cursory survey of a small handful of cases that this Court and the Sixth and Ninth Circuits have considered. However, there is no substantive analysis of the Ninth Circuit decision that the Petition seeks to bring before this Court or why that decision needs to be reviewed.

The closest the Petition comes to any such analysis is to refer back to its discussion in the previous section of the Petition (pp. 32-39) as to why the commercial-noncommercial distinction is overbroad and content-based. This reference back reveals that this entire section of the Petition (pp. 40-44) is nothing more than a cold rehash of the same issues presented earlier and adds nothing to the analysis of the alleged issues there.

Therefore, ultimately, as with the Petition's other arguments, there is no issue from the decision here that warrants this Court's review.

CONCLUSION

No matter how many different ways the Petition seeks to frame a reviewable constitutional issue from the Ninth Circuit's unanimous decision, there is no basis for review. The well-considered decision of the three-judge panel is, in and of itself, a wholly correct decision. The emphatic denial of both panel rehearing and *en banc* rehearing underscores that fact.

The Ninth Circuit's decision is also the culmination of years of administrative and judicial review - in both state and federal fora - of the issues raised by Petitioner's use of the display for unsanctioned offsite advertising. In each of those fora, Petitioner has lost at nearly every turn, and where he had limited success, subsequent legislative action corrected the flaw. That corrective legislation cured the constitutional defect and has obviated the need for further judicial review.

The Petition asks this Court for an advisory opinion on issues not properly before it simply because Petitioner disagrees with the state of the well-settled First Amendment law. Ultimately, however, there is no basis for review here.

For any and all the reasons state above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney for Respondent

(3)

No. 09-359

Supreme Court, U.S.
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In The

Supreme Court of the United States

NANO MALDONADO, AN INDIVIDUAL,

Petitioner,

v.

RANDELL IWASAKI, IN HIS CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUMMARY OF THE CASE

In the early 1990's petitioner Maldonado bought a parcel of land adjacent to an interstate highway. The land was improved with a warehouse and billboard in 1956.

Maldonado's billboard structure is located within a zone subject to regulation under the California Outdoor Advertising Act ("Act"). Consistent with the Highway Beautification Act enacted by Congress,[1] the California Act has always exempted billboards from regulation so long as the owners self-censor their billboard publications to messages advertising "goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed." Bus. & Prof. Code § 5442(c); App. 143.

Until a recent amendment, all other publications (including offsite noncommercial advertisements) were prohibited. Bus. & Prof. Code § 5440; App. 143. Violations are chargeable as a public nuisance or misdemeanor. Bus. & Prof. Code §§ 5461 and 5464; App. 144.

Despite the ban, the owners of other billboard structures built prior to the enactment of the modern version of the Act in 1967 are allowed to publish

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[1] See 23 U.S.C. § 131(c)(3) and 23 F.C.R. §§ 750.105 and 750.709. The Highway Beautification Act does not preempt state law, it merely provides a "carrot" (or "stick"). *National Advertising Co. v. City of Ashland, Oregon*, 678 F.2d 106, 108-109 (CA9 1982) (Kennedy, J.).

offsite commercial advertising within the same zone as Maldonado. App. 53.

Maldonado, however, was cited, charged, and convicted of maintaining a public nuisance for publishing advertisements for the Stanford University football team and four local businesses between 1993 and 1996. *People ex rel. Dept. of Transportation v. Maldonado* ("*Maldonado I*"), 86 Cal.App.4th 1225, 1228 (2001). The state court issued a permanent injunction forbidding Maldonado from publishing any advertisements that do not exclusively relate to goods and services sold on the premises, or activities conducted thereon. *Id.* at 1233-1235; see also, *Maldonado v. Morales* ("*Maldonado IV*"), 556 F.3d 1037, 1041 (CA9 2009) (reciting injunction language); App. 4.

Maldonado thereafter suffered multiple contempt convictions in state court for violating the injunction. The last conviction was for publishing a Habitat for Humanity advertisement stating, "With your help we're Building Community on the Peninsula." *Maldonado v. Kempton* ("*Maldonado III*"), 422 F.Supp.2d 1169, 1170-1171 (N.D. Cal. 2006); App. 68. During the same proceeding, Maldonado was acquitted of contempt for publishing the messages, "In God We Trust" "We Pray For World Peace" and "Help Stop Terrorism." *Ibid.*

Although Respondent Iwasaki ("the Director") argues "there was no showing that any noncommercial speech had ever been impermissibly denied"

(Opp. 4), the Habitat for Humanity conviction certainly belies that assertion and the District Court expressly ruled that the other messages for which Maldonado was charged "unquestionably contained non-commercial speech" and that "the confusion surrounding the issue bolsters plaintiff's claim that he feels 'chilled' from displaying non-commercial messages on his billboard." *Maldonado III*, 422 F.Supp.2d 1169, 1175; App. 80.

The District Court ruled the Act was facially unconstitutional (*Maldonado III*), and the Director did not appeal that ruling. Instead, the State amended the Act as follows:

> Notwithstanding any other provision of this chapter, the director may not regulate non-commercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter.

Bus. & Prof. Code § 5275.

The dispute now, broadly stated, is whether that amendment cures the constitutional infirmities, or simply imposes new constitutional infirmities.

ARGUMENT

I. THIS COURT SHOULD REVIEW WHETHER THE COMMERCIAL-NONCOMMERCIAL DISTINCTION IS SO VAGUE, OVERBROAD, AND ARBITRARY THAT IT VIOLATES DUE PROCESS AND ABRIDGES THE FREEDOM OF SPEECH AND PRESS

Maldonado's brief on the merits will demonstrate that the statutory phrase "noncommercial, protected speech" and all of the judicially-crafted definitions of "commercial speech" are vague, overbroad, or arbitrary.

"Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause. . . ." *U.S. v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 1845 (2008). In the First Amendment context, facial challenges are permitted. *Ibid.*

The vagueness doctrine addresses three main concerns:

> 1. Fair Notice: "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."
>
> 2. Arbitrary Enforcement: "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis,

> with the attendant dangers of arbitrary and discriminatory application."
>
> 3. Chill of Free Expression: "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (quote marks and citations omitted).

The vagueness doctrine is applicable to both civil and criminal statutes. *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). However, "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily on civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948).

A related, but distinct, concept is the First Amendment doctrine of overbreadth. "[A] statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 128 S.Ct. 1830, 1838. The overbreadth must be substantial "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.*

Even a "widely used and well understood word" can be *both* vague and overbroad if people must guess at its contextual meaning and if its common meaning

includes protected expression. *Coates v. City of Cincinnati*, 402 U.S. 611, 612-614 (1971).

The terms "commercial" and "noncommercial" are widely used, but the distinction is "by no means clear" for a *legal categorization* of expression. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423, n. 19 (1993); accord, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 536-539 (1981) (Brennan, J., concurring in judgment) (discussing issue and providing thought-provoking hypotheticals); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) ("the precise bounds of the category" is "subject to doubt"); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in judgment) ("the borders of the commercial speech category are not nearly as clear as the Court has assumed").

The question must be asked: If making the commercial-noncommercial distinction is "by no means clear" to the learned Justices of the United States Supreme Court, how is "the person of ordinary intelligence" and no legal training supposed to determine whether any particular message constitutes commercial or noncommercial speech? That question is particularly important here because the Act has criminal penalties.

This Court has used six distinct approaches to categorizing commercial speech since the commercial speech doctrine sprang out of nowhere in the overruled case of *Valentine v. Chrestensen*, 316 U.S. 52

(1943). Pet. 9-26. Two other novel approaches have been utilized by the Seventh Circuit and California Supreme Court. Pet. 29-31. Surely there is a compelling need to settle the law.

Although no circuit court has had the audacity to rule that the standards articulated by this Court are too vague or overbroad, it certainly cannot be denied that there is a circuit split as to *which* standard to apply. Pet. 28-29.

Maldonado is subject to both the Ninth Circuit and California approaches. Pet. 31. The Director argues that *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 960 (2002) is not applicable. Opp. 21. But the Director cites no legal authority to undermine *U.D. Registry, Inc. v. State*, 144 Cal.App.4th 405, 420 (2006) which held "there is no single bright line test for defining commercial speech." *U.D.* at 421 paraphrasing *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1381, n. 7 (2003). Nor does the Director disclose which approach he contends California *does* apply. If it is the "Economic Interests" Approach adopted by California's intermediate appellate courts prior to *Nike* (see, Pet. 30), a conflict would still exist with the Ninth Circuit's "Dual Analysis" Approach.

The Director's string-citation to similar laws across America (Pet. 25) only accentuates the compelling need to grant review because it demonstrates the national importance of the issue. National advertisers are subject to multiple standards. Moreover, millions of small business owners with onsite signs

undoubtedly face the same censorship as Maldonado, but lack the gumption, stamina, and wherewithal to wage a legal battle all the way to this Court.

Finally, individual Members of this Court have repeatedly criticized existing doctrine. Pet. 26-27. Indeed, the Court itself has frequently criticized existing doctrine. Pet. 16, 18, 20-21, and 24; see especially, *Cincinnati*, 507 U.S. 410, 419-423 and n. 19 (suggesting the commercial-noncommercial distinction is vague, overbroad, and content-based); and see also, *id.* at n. 11 (suggesting that commercial speech should be "subjected to more exacting review" than *Central Hudson* provides).

On the merits, Maldonado will demonstrate that there is no textual or historical basis for the commercial speech doctrine and that its existence is wholly unnecessary to the legitimate and effective regulation of commerce. Secondarily, he will demonstrate that if the distinction must remain, the least objectionable and most workable approach would be to limit the doctrine to false and misleading speech. See, Pet. 9-13 ("Common Sense" Approach) and *cf.*, Pet. 25-26 ("Special Care" Approach).

II. THIS COURT SHOULD REVIEW WHETHER *CINCINNATI* CONSTITUTES BINDING PRECEDENT IN THE CONTEXT OF BILLBOARDS

A. The Commercial-Noncommercial Distinction Fails the Fourth Prong of *Central Hudson*

This Court has already distinguished the commercial-noncommercial distinction discussed in Part III of *Cincinnati*, from the "offsite-onsite distinction" involving "disparate treatment of two types of commercial speech" discussed in Part IV of the *Metromedia* plurality opinion.[2] *Cincinnati*, 507 U.S. 425, n. 20. Speaking through Justice Stevens (who had joined Parts I through IV of *Metromedia*), this Court noted that the seven Justices who had approved the offsite-onsite distinction of commercial speech in *Metromedia* "did not say" the government could "*distinguish* between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns" because "[t]hat question was not presented in *Metromedia*. . . ." *Ibid.* (emphasis in original).

Indeed, a case is not authority for a point not considered. *R.A.V. v. City of St. Paul, Minnesota*, 505

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[2] As the Director notes (Opp. 25, n. 9), the Oregon Supreme Court did not even bother to *distinguish* the onsite-offsite distinction discussed in *Metromedia*; rather, it simply *invalidated* it under the Oregon Constitution. *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 Ore. 275, 292-299 (2006).

U.S. 377, 386, n. 5 (1992). And if statements in an opinion "go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. State of Virginia*, 19 U.S. 264, 399-400 (1821) (Marshall, C.J.).

One very recent case has attempted to distinguish *Cincinnati* on the basis of an evidentiary showing relevant to the issue of effectiveness. *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 225 (CA5 2009) (comparing paltry number of newsracks removed with large number of billboards removed). But in *Cincinnati* this Court *accepted* the argument under prong three of *Central Hudson* that every decrease in newsracks "necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape." *Cincinnati*, 507 U.S. 425, 418. It nevertheless invalidated the ordinance because under prong four the commercial-noncommercial criteria for removal (the means) had no logical nexus with increased safety and aesthetics (the ends). *Cincinnati*, 507 U.S. 425, 418 (commercial racks "were no more harmful"), and *id.* at 425-426 (commercial racks were "no greater an eyesore").

B. The Commercial-Noncommercial Distinction Is Content-Based

In Part IV of *Cincinnati* this Court held that the commercial-noncommercial distinction is content-based (and therefore not subject to "time, place, and manner" analysis). *Cincinnati*, 507 U.S. 410, 428-431.

The first Ninth Circuit case to analyze *Cincinnati* failed to heed this Court's ruling that the commercial-noncommercial distinction is content-based; this legal weed not only flourishes as the blooming law of the circuit, but has in this case, germinated and spread its precedent-resilient seed into equal protection and prior restraint doctrine. See Pet. 34-35 (discussing *Outdoor Systems, Inc. v. City of Mesa*, 997 F.3d 604 (CA9 1993) and its progeny) and Pet. 35-37 (discussing erroneous equal protection and prior restraint standards used in *Maldonado IV*).

The erroneous rulings in this case must be tended to before they take firm root in the largest circuit of the nation. The mistaken notion that the commercial-noncommercial distinction is content-neutral is particularly important to eradicate because "[t]he normal inquiry that [Supreme Court] doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring).

Here, as discussed below, the erroneous law of the circuit caused the panel below to apply the wrong level of scrutiny in its prior restraint and equal protection analysis.

1. Prior Restraint

Even as to defamatory or obscene speech, the government may not use the heavy hand of a

nuisance statute to declare certain categories of speech illegal, and then restrain future publications by way of an injunction enforced by the judicial contempt power. Pet. 36-37 (citing cases). Doing so "is the essence of censorship." *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

In *dicta* this Court has hinted "that traditional prior restraint doctrine may not apply" to commercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 571, n. 13 (1980). But later *dicta* indicated such content-based regulations of commercial speech must be based upon "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection" such as "the risk of fraud." *R.A.V.*, 505 U.S. 377, 388-389.

Here, the District Court analyzed the state court injunction under the intermediate scrutiny test articulated in *Central Hudson*. App. 43-45. The Ninth Circuit acknowledged that this Court has "not addressed" what standard should generally be applied when reviewing "an injunction regulating commercial speech." *Maldonado IV*, 556 F.3d 1037, 1047; App. 19-20. But since circuit precedent held the commercial-noncommercial distinction to be *content-neutral*, the panel below analyzed the state court injunction under the malleable "intermediate-intermediate" standard of scrutiny. *Ibid.* citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

Maldonado contends strict scrutiny should have been applied. Pet. 36-38.

2. Equal Protection

The Director argued below that the equal protection claim should be analyzed under rational basis scrutiny. App. 33 citing *People ex rel. Dept. of Transportation v. Desert Outdoor Advertising, Inc.*, 68 Cal.App.3d 440, 450 (1977); see also, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 907 (CA9 2007).

The Ninth Circuit and District Court both upheld the restrictions under intermediate scrutiny. *Maldonado IV*, 556 F.3d 1037, 1048; App. 20-22 (Ninth Circuit); App. 25-36 and 49-54 (District Court). They so ruled despite this Court's admonition that "[e]ven under the degree of scrutiny . . . applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 193-194 (1999).

Again, Maldonado contends that strict scrutiny should have been applied to the content-based commercial-noncommercial distinction. Pet. 36 (citing cases).

III. THIS COURT SHOULD REVIEW WHETHER EVIDENCE IS REQUIRED TO DEMONSTRATE THAT A COMMERCIAL-NONCOMMERCIAL DISTINCTION "MATERIALLY ADVANCES" SAFETY AND AESTHETIC INTERESTS IN THE CONTEXT OF BILLBOARDS

The Director cites *Rappa v. New Castle County*, 18 F.3d 1043, 1055 (CA3 1994) in opposition to Maldonado's third question presented. But *Rappa* does not stand for the proposition for which it is cited (*i.e.* that the *Metromedia* plurality is binding simply because Justice Stevens joined Parts I through IV). Rather, *Rappa* stands for the opposite point (*i.e.* that the mode of analysis of the *Metromedia* plurality is *not* binding). *Id.* at 1058 ("Simply stated, the plurality and the concurrence took such markedly different approaches to the San Diego ordinance that there is no common denominator between them."); see also, *id.* at 1060 ("neither the plurality nor the concurrence 'articulates a legal standard which, when applied, will *necessarily* produce results with which a majority of the Court from that case would agree' ").

Moreover, Justice Stevens' opinion in *Metromedia* did not imbue Justice White's plurality opinion with majority status because Justice Stevens did not concur in the judgment. *Cf.*, *O'Dell v. Netherland*, 521 U.S. 151, 160, 162 (1997) ("Justice White concurred in the judgment, providing the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment*.") (emphasis added); accord, Goodhart, *Determining the Ratio Decidendi of a Case*,

40 Yale L.J. 161, 182 (1930) ("The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.").

Finally, this Court should take note of a recent billboard case where, in contrast to Ninth Circuit precedent, summary judgment was denied due to lack of *evidence* of material advancement. *Interstate Outdoor Advertising v. Zoning Board of The Township of Cherry Hill*, ___ F.Supp.2d ___ (D.N.J. 2009); 2009 WL 4691393 (Dec. 7, 2009), citing *Bell v. Township of Stafford*, 110 N.J. 384 (1988).

CONCLUSION

Petitioner Maldonado has presented this Court with compelling reasons to review all three questions presented. The opposition papers merely underscore the point that the commercial speech doctrine in general, and the law of billboards in particular, are in need of major revision, or at least clarification.

Respectfully submitted,

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